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## ARTICLE

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### MISSING DECISIONS

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*Significant numbers of federal appellate decisions are missing from Westlaw and Lexis. Bloomberg Law has similar, and similarly incomplete, coverage. Across most of the circuits, at least twenty-five percent or more of the courts' self-reported merits terminations, which predominately include unpublished decisions, never make their way to these databases.*

*Since at least 2007, when a rule change permitted citation to unpublished decisions from the federal appellate courts, scholars widely have assumed that commercial databases for legal research capture nearly all—if not, in fact, all—federal appellate merits decisions whether designated for publication in the Federal Reporter or not. Although scholars have long considered how publication practices shape access to court decisions—especially at the district court level—this is the first work to analyze and document widespread shortcomings of commercial database access to unpublished federal appellate decisions.*

*Unraveling the widely held assumption of access raises concerns over our ability to navigate and uncover useful precedent and to determine basic information about how the federal system administers justice. The solution is as simple as it is*

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*transformational: all final judge-issued decisions from the federal appellate courts should be publicly and freely accessible on court websites. The courts themselves must be responsible for this change. How they issue decisions is the likely cause of missing decisions, and market pressures may not create sufficient incentive for private actors—the databases themselves—to undertake the steps necessary to recover what’s missing.*

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## INTRODUCTION

This is the story of *Jones v. Gelb*.<sup>1</sup> Antonio Jones alleged that a corrections officer used pepper spray on him multiple times while Mr. Jones was already subdued; he was seated on the ground in full leg and arm restraints and had just undergone knee surgery.<sup>2</sup> The officer told Mr. Jones he wanted him to “die quick[ly].”<sup>3</sup> According to the U.S. Court of Appeals for the First Circuit, a video was consistent with Mr. Jones’s description of the events but was not conclusive; on appeal, that court vacated the summary judgment decision granting the officer qualified immunity.<sup>4</sup> In ruling for Mr. Jones, the First Circuit cited law from other circuits to support its conclusion that a jury could

<sup>1</sup> No. 15-1680 (1st Cir. Mar. 23, 2017) (on file with author).

<sup>2</sup> *Id.*, slip op. at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* The court affirmed the grant of summary judgment to another officer who had used “*de minimis* force” on Mr. Jones during the same incident, other officers for their involvement in a separate incident, and a nurse who had not been “properly served or identified.” *Id.* at 3.

decide the officer had acted maliciously and therefore was not entitled to immunity from trial.<sup>5</sup> *Jones* arguably makes new law—or at least clarifies existing law—in the First Circuit.<sup>6</sup>

And yet you will not find *Jones* on Westlaw, Lexis, or Bloomberg Law.<sup>7</sup> *Jones* is not an exception—at least not in that respect. (It is an exceptional result for a prisoner pursuing a civil rights claim.<sup>8</sup>) For more than a decade, federal appellate courts have been screening—wittingly or not—thousands of decisions like Mr. Jones’s case from the bench and bar. The decision in Mr. Jones’s pro se appeal is just one example of what’s missing.

There were nearly 10,000 federal appellate “merits terminations”—a term explained and defined in Part I<sup>9</sup>—issued during the same twelve-month period that, like Mr. Jones’s, never made it to Westlaw, Lexis, or Bloomberg Law.<sup>10</sup> Out of approximately 34,000 such decisions issued during that period, approximately twenty-seven percent are missing from the most popular and powerful commercial legal databases.<sup>11</sup>

That time period is not an aberration. Access to merits terminations in federal appellate proceedings has been poor—or, at best, inconsistent—for at least the last decade.<sup>12</sup> Depending on the year, as many as forty percent of merits terminations from the federal appellate courts are missing from commercial databases. The First Circuit is not an outlier, either. Although the First Circuit’s coverage gap is among the most substantial, during the same period the U.S. Courts of Appeals for the Third Circuit and the Sixth Circuit both had coverage gaps similar to that of the First Circuit.<sup>13</sup>

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<sup>5</sup> *Id.* at 2-3 (citing Tenth Circuit, Eighth Circuit, and Ninth Circuit precedent); *see also infra* notes 176-179 and accompanying text (discussing skewing effects of missing decisions on civil rights law in particular).

<sup>6</sup> *See infra* notes 174-175 and accompanying text (discussing cases decided after *Jones*).

<sup>7</sup> *Jones* is available, as are all “missing decisions,” on PACER, the federal courts’ publicly accessible electronic docketing system. For more on the PACER system, *see infra* note 67 and accompanying text (discussing problems with PACER).

<sup>8</sup> Nationally, less than five percent of “private prisoner” appeals (a category that includes nonfederal prisoners like Mr. Jones) were reversed during the same twelve-month period. *See* ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-5 (2017) [hereinafter 2017 JUDICIAL BUSINESS]; *see also id.* tbl.B-1A (expanding on category of “private prisoner” petitions). The Administrative Office classifies decisions affirmed in part and reversed in part as “affirmed.” *Id.* tbl.B-5 n.1. The First Circuit did not reverse or remand any other state prisoner’s appeal during the same period. *Id.* tbl.B-5. All Administrative Office data tables discussed in this Article may be found on the Administrative Office website. *Caseload Statistics Data Tables*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables> [https://perma.cc/SL2J-M34W].

<sup>9</sup> *See infra* notes 73-82 and accompanying text (explaining and defining “merits terminations”).

<sup>10</sup> *See infra* Table 1.

<sup>11</sup> *See infra* Figure 1. Westlaw, Lexis, and Bloomberg Law, in contrast, are among the “most trusted” legal commercial databases. Paul Hellyer, *Evaluating Shepard’s, KeyCite, and BCite for Case Validation Accuracy*, 110 L. LIBR. J. 449, 449 (2018).

<sup>12</sup> *See infra* Appendix A (collecting data on missing decisions dating back to September 30, 2008).

<sup>13</sup> *See infra* Figure 3.

Concerns over coverage of federal court decisions on commercial databases are not new—and there is a rich literature on these issues, especially at the federal district-court level.<sup>14</sup> Christina L. Boyd, Pauline Kim, and Margo Schlanger’s recent work reveals “vast variation in visibility” into district court work depending on the research tool used.<sup>15</sup> Elizabeth McCuskey’s earlier work on access to district court decisions identified what she termed “submerged precedent” at the district-court level—“reasoned opinions available only on court dockets, and not on the Westlaw and Lexis commercial databases.”<sup>16</sup> Building on McCuskey’s work, Michael Kagan, Rebecca Gill, and Fatma Marouf challenged assumptions about access to federal appellate decisions in the immigration context.<sup>17</sup> They revealed that many—if not nearly all—decisions resolving immigration appeals were missing from Westlaw (and to a lesser extent, Lexis).<sup>18</sup>

But this Article is the first to show that the problem of access to circuit-level decisions is much bigger than anyone—including the commercial databases<sup>19</sup>—has realized. For at least a decade or more, scholars have thought (even while questioning *district court* access) that “[a]ll reasoned [federal]

14 See, e.g., Christina L. Boyd, Pauline T. Kim & Margo Schlanger, *Mapping the Iceberg: The Impact of Data Sources on the Study of District Courts*, 17 J. EMPIRICAL LEGAL STUD. 466, 466 (2020) (“[T]he work of federal district courts looks different depending on whether research relies on published opinions, on opinions available on Westlaw or Lexis . . . or on more comprehensive data available on PACER . . .”); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 686-88 (2007) (challenging the assumption that commercial databases provide representative samples of district court decisions); Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 153, 158 (2006) (“[E]ven when judges have written opinions, and allowed those opinions to be published in print or on-line sources, such sources rarely tell the entire story of a litigation.”).

15 Boyd et al., *supra* note 14, at 466.

16 See Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 516 (2016) (evaluating accessibility of unpublished, yet reasoned district court decisions); see also Peter W. Martin, *District Court Opinions that Remain Hidden Despite a Long-Standing Congressional Mandate of Transparency—The Result of Judicial Autonomy and Systemic Indifference*, 110 L. LIB. J. 305, 313 (2018) (describing the difficulty in finding these unpublished decisions using the district courts’ websites).

17 See Michael Kagan, Rebecca Gill & Fatma Marouf, *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO. L.J. 683, 685-86 (2018) (establishing that many—and in some circuits, most—unpublished decisions in immigration appeals are unavailable on Westlaw and, to a lesser extent, Lexis).

18 See *id.* at 685 (“[W]e were surprised to find that many cases that PACER showed had been decided on substantive grounds did not appear when we looked for them in Westlaw or Lexis. . . . Westlaw includes almost none of them. Lexis is better, but it still is missing large numbers of these cases . . .”).

19 See, e.g., James M. Anderson, Eric Helland & Merritt McAlister, *Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases*, 103 GEO. L.J. 1163, 1183 n.97 (2015) (quoting e-mail from Westlaw Reference Attorney, explaining that “I do not believe there are any U.S. Court of Appeals decisions that are not on Westlaw in some format, unless there would be some type of court order sealing it or ordering it not be made public. I would guess this would be a very rare situation.”).

appellate opinions are open to public view.”<sup>20</sup> Although the courts have relied increasingly on so-called “unpublished decisions”<sup>21</sup>—decisions not designated for inclusion in the *West Federal Reporter*—academics and practitioners alike have long assumed that unpublished decisions were widely available on free court websites and in commercial databases.<sup>22</sup>

The access problems we face for federal district court decisions also exist at the federal appellate level—albeit to a lesser extent. At no time over the last decade, have we had complete, navigable access to all reasoned or substantive decisions from the U.S. Courts of Appeals on Westlaw, Lexis, Bloomberg Law, or FDsys, the only government-run consolidated court opinions database.

What is missing, then? The short answer: decisions from the appellate courts that are not available for free on court websites. Commercial databases largely depend on the courts themselves for access to the opinions and orders that ultimately populate their databases.<sup>23</sup> If a decision is not on a free court website, it likely won’t end up in a commercial database (unless requested for inclusion by a database customer). “Missing decisions” are available on the publicly accessible federal court docketing database, PACER, but they are not available for *free*. The commercial databases do not routinely incur PACER fees to retrieve content; whatever appellate work product is locked away behind PACER’s paywall generally stays that way.

The courts denominate many merits terminations as “opinions of the court,” a term of art that renders the decisions available for free through PACER,<sup>24</sup> but they issue other terminations—denominated (at least in the First Circuit) as

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20 McCuskey, *supra* note 16, at 517; *see also id.* (“The current debate at the appellate level no longer questions public access to unpublished opinions, but now centers on appellate courts’ prerogative to label those opinions prospectively as fit for future precedential use.”); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* 59 (2013) (“Unpublished decisions are now available online and can be easily accessed and analyzed there.”); Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 *UCLA L. REV.* 808, 810 n.2 (2018) (“Although ‘nonprecedential’ and ‘unpublished’ can be used interchangeably, this Article prefers the term ‘nonprecedential’ given post-2001 publication of all opinions in *West’s Federal Appendix*.”); Robert A. Mead, “Unpublished” *Opinions as the Bulk of the Iceberg: Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals*, 93 *LAW LIBR. J.* 589, 595 (2001) (“Because Westlaw, LexisNexis, and court Web sites all include unpublished courts of appeals opinions in their databases, practitioners and the public now have access to these opinions regardless of whether they are published in the *Federal Reporter*.”).

21 Today, approximately eighty-eight percent of merits terminations in the federal appellate courts are “unpublished.” ADMIN. OFF. OF THE U.S. CTS., *JUDICIAL BUSINESS OF THE U.S. COURTS* tbl.B-12 (2018) [hereinafter 2018 *JUDICIAL BUSINESS*].

22 *See, e.g.*, Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 *GREEN BAG* 2d 17, 18 (2000) (“[T]here is really no such thing as an ‘unpublished opinion’ of a federal appellate court.”).

23 *See infra* notes 69–72 and accompanying text.

24 *See infra* notes 72, 238–244 and accompanying text (discussing written opinion designation and operation of the E-Government Act). Peter Martin has described this process at the district court level in detail. *See generally* Martin, *supra* note 16.

“judgments”—that are not available for free.<sup>25</sup> How each panel resolves each appeal—whether by written opinion that will be widely available for free as an “opinion of the court” or by judgment locked away behind PACER’s paywall—is a decision left to each panel.<sup>26</sup> At least some of these “judgments” (but certainly not all) are more substantive than the “judgment” label might suggest.<sup>27</sup>

The discovery of missing unpublished decisions undermines a core assumption about the study of the federal appellate courts—namely, that we can easily access and navigate all substantive work of the federal appellate courts using existing technology. It is not now, and likely never has been, true that we have usable and navigable access to all of the substantive work of the federal appellate courts. That’s a concerning discovery for empiricists, who have been charged with overreliance on published federal appellate decisions for data and have warned of the pitfalls of failing to account for unpublished decisions.<sup>28</sup> Reliance on commercial databases for unpublished decisions likewise carries a risk of sampling bias.

For scholars of the federal courts, this Article describes a third tier of federal appellate decisions that has operated out of sight for well over a decade. We’ve long understood the federal appellate system to have two tracks or two tiers: a first for the most “important” federal appellate cases resolved with published opinions, and a lesser, second tier for common disputes ending in unpublished decisions.<sup>29</sup> But there may be an even lesser, third tier filled with hidden or missing unpublished decisions that never make their way to the commercial databases that scholars, practitioners, and courts use.<sup>30</sup> These decisions’ relative invisibility renders them essentially useless to

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<sup>25</sup> See *infra* notes 152–156 and accompanying text (describing First Circuit decisional issuance scheme).

<sup>26</sup> See, e.g., 1ST CIR. R. 36.o(b) (“As members of a panel prepare for argument, they shall give thought to the appropriate mode of disposition . . . . At conference the mode of disposition shall be discussed and, if feasible, agreed upon.”).

<sup>27</sup> Appendix B contains examples of several substantive judgments from the First Circuit.

<sup>28</sup> See, e.g., Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1899–1900 (2009) (“The omission of unpublished decisions [from empirical legal analyses] almost surely skews results in favor of finding greater influence from extralegal factors.”).

<sup>29</sup> See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275–76 (1996) (describing how federal appellate triage gives rise to these “different tracks of justice”); see also Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1460–61 (2004) (explaining the impact of two-tier appellate review system on vulnerable and unpopular litigants). Note that although some scholars have described the federal appellate justice triage system as having two “tracks,” I prefer to use the term “tiers,” as it better reflects the reality that some cases receive far more scrutiny, attention, and judicial effort than others.

<sup>30</sup> See *infra* notes 94–97 and accompanying text (discussing third tier of federal appellate decisions). Some might conceive of this discovery as providing a greater or deeper understanding of the content of the second tier. Because of its relative invisibility and the possibility that it includes

all but court insiders and the parties themselves—an access and use limitation that rule changes and technological shifts sought to ameliorate long ago.

For scholars concerned with access to justice, this discovery calls into question our ability to assess how the federal appellate courts administer justice. If only three-quarters of the work of the federal appellate courts has ever been truly visible to us, how can we assess the quality of process and the even-handedness of treatment that these courts have provided?

More problematic, still, is that what's missing from commercial databases appears to include disproportionately appeals from the most vulnerable litigants—including pro se litigants, criminal appellants, and noncitizens. Although the litigants themselves receive the decisions that the rest of us cannot find, the selective issuance scheme may change the shape and scope of available law. As the *Jones* case itself highlights,<sup>31</sup> some missing decisions may inform the contours of the duties imposed on defendant state actors—and yet bench, bar, and the actors themselves do not have ready access to those decisions for use in future cases. Missing decisions, therefore, may skew the law itself, depriving litigants of useful precedent and potentially shaping the contours of a state actor's constitutional duties. Not all missing decisions are as consequential as the tableau that begins this piece. But at least some are.

For practitioners and other legal researchers, this Article reveals that we've been lulled into a false sense of transparency and access to precedent by rule changes and legislation that seemingly ensured navigable access and the free use of unpublished decisions across the federal appellate courts. We have mistaken the federal system's lofty commitment to access with the reality on the ground.

The implications of this work extend well beyond the halls of academia. I call here on the courts to address this problem, and, in doing so, question the structure and transparency of basic court processes themselves. Courts have devolved decisions about access to individual judges or panels—or, perhaps, individual court clerks—who triage decisions and, in the process, effectively limit access to those decisions deemed less consequential. The screening may occur without any awareness of its consequences—that is, without any awareness that the commercial databases generally do not pay for access to the less formal types of appellate decisions used to resolve some appeals. But this Article exposes those consequences and, in so doing, calls for the courts to change their processes to ensure complete and free access to all final, judge-issued decisions of the federal appellate courts.

This Article begins at the end: Part I explains just how wrong our assumptions about access to unpublished federal appellate decisions have

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decisions of the worst quality in some circuits, I argue here that it represents a class of decisions deserving its own examination and its own treatment as a third tier.

<sup>31</sup> See *supra* notes 1–6 and accompanying text (discussing *Jones*).

been. Part II works through the details of this discovery, providing a deeper understanding of what appears to be missing from commercial databases by examining a sample of missing decisions from one circuit. Part III grapples with the implications of this discovery, including what this work means for our ability to navigate useful precedent and scrutinize the work of the federal appellate system. Part IV offers the fix: the federal appellate courts must transform their processes to make every final judge-issued decision available on a free and publicly accessible website.

### I. ACCESS TO UNPUBLISHED FEDERAL APPELLATE DECISIONS

This Part tells the story of what we thought we knew and what we now know about our ability to navigate unpublished federal appellate decisions. That story begins with an explanation of what unpublished decisions we—scholars, practicing lawyers, the public, and the commercial databases—thought were navigable and easily retrievable before now.<sup>32</sup> Then, to borrow from McCuskey's concept of "submerged [district court] precedent,"<sup>33</sup> this Part describes what we now know: there's a whole lot of submerged appellate precedent, too.<sup>34</sup>

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<sup>32</sup> By email or telephone or both, I had conversations with each of the three major commercial databases discussed here. None of their representatives indicated any awareness of significant coverage gaps in access to unpublished federal appellate decisions; Westlaw and Lexis, in particular, indicated they had complete coverage. See E-mail from Sue Moore, Acad. Acct. Manager, Thomson Reuters, to author (Sept. 4, 2019, 8:58 AM) (on file with author) (relaying information from Amanda Kenny, Prod. Dev., Thomson Reuters) ("[B]eginning in 2006, there were approximately 300 non-precedential decisions that were unavailable to Westlaw. The majority of those opinions consisted of tables without text sent by the 11th Circuit. . . . 2012 was the last year that Westlaw received tables without text from the 11th Circuit, which was the last court to cease sending such tables. As of 2013, non-precedential decisions became available from all circuits."); E-mail from Vicki K. Pyles, Prac. Area Consultant, LexisNexis Legal & Pro., to Patricia Morgan, Professor of Legal Rsch., Univ. of Fla. Levin Coll. of L. (Oct. 21, 2019, 1:29 PM) (relaying information from Emma Dickinson, Prod. Manager) (on file with author) ("You should expect to find all US Courts of Appeals opinions online, including published and unpublished opinions. If we do miss a case, we are always happy to add it to our database."); E-mail from Tiffany Lozano, Customer Experience Manager, Bloomberg L., to author (Aug. 15, 2019, 11:06 AM) (on file with author) (Bloomberg Law has "a more expansive collection of unpublished decisions within the last 10-15 years.").

<sup>33</sup> McCuskey, *supra* note 16, at 516.

<sup>34</sup> Throughout this Article, I invoke the concept of "precedent" broadly and inclusively. Because decisions not designated for publication are not binding on other parties and lower courts, they are usually described as "nonprecedential." For reasons discussed later, *see infra* note 38, I think that label a bit of a misnomer, especially in this context. Although unpublished decisions are neither *vertical* precedent nor subject to the prior-panel rule, they are still doctrinally precedential. See McCuskey, *supra* note 16, at 519 (using the term "precedent" to refer to "any written decision supported by reasoned elaboration" and arguing that "[r]easoned elaboration long has been considered precedent's defining feature, and supplies a decision's potential utility in deciding future cases"). But see Kagan et al., *supra* note 17, at 690 (stating that McCuskey uses term "precedent more loosely" than other scholars).



### A. *What We Thought We Knew*

Although the distinction between “published” and “unpublished” decisions is of relatively recent origin, for a decade or more we generally have thought we had full access to both types of decisions at the federal appellate level.<sup>35</sup> Freedom of access—and the ubiquity of “unpublished” decisions in essentially “published” form—had rendered the idea of “unpublished” decisions a “misnomer” to some.<sup>36</sup> This Section will explain how we came to our historical—and now inaccurate—understanding of access to unpublished decisions.

Before World War II, final decisions in appeals as of right to the U.S. Courts of Appeals were almost all published in the *West Federal Reporter*.<sup>37</sup> The category of “unpublished decisions”<sup>38</sup> as we know it now didn’t exist until the mid-twentieth century. That is not to say that every federal appellate decision always has been published “in the sense of being printed in a book.”<sup>39</sup> Indeed, as one federal appellate court has explained, “there was almost no private reporting and no official reporting at all in the American states” at the time of

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<sup>35</sup> The assumption of access likely dates back to circa 2001, when West developed the *Federal Appendix*, a reporter which “publishes” unpublished decisions. By then, courts themselves recognized that unpublished decisions were widely available to lawyers through electronic means. As the Fifth Circuit put it:

[W]hen this court promulgated rule 47.5 [related to citation of unpublished decisions] in 1995, the relative unavailability of unpublished opinions rendered their use as precedent fundamentally unfair. Today, however, that proposition is untenable: “Between Lexis and Westlaw, Internet sites maintained by universities and some of the circuit courts of appeals, and networks of attorneys practicing in particular fields, it is the rare opinion that is not disseminated for mass consumption.”

*Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 261 (5th Cir. 2001) (quoting *Boggs & Brooks*, *supra* note 22, at 18).

<sup>36</sup> See, e.g., David F. Levi, *Autocrat of the Armchair*, 58 DUKE L.J. 1791, 1801-02 (2009) (describing the “unpublished” moniker as a “misnomer”).

<sup>37</sup> See *RICHMAN & REYNOLDS*, *supra* note 20, at 10-16 (discussing development of limited publication plans across the circuits).

<sup>38</sup> The publication designation identifies inclusion in the official *West Federal Reporter*. Publication is significant only because it distinguishes between “precedential” and “nonprecedential” decisions; only those decisions included in the *Federal Reporter* are binding precedent. See Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure* 32.1, 47 B.C. L. REV. 705, 708 (2006). Some scholars prefer the label “nonprecedential” instead of “unpublished” for this reason and because “unpublished” decisions are thought to be widely available and usually “published” in less official forms. See, e.g., *Beske*, *supra* note 20, at 810 n.2. I, however, will stick with the term “unpublished” for three reasons. First, it is the term of art used by the Administrative Office of the U.S. Courts. See 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12. Second, I take a broader view of the meaning of the word “precedent,” and many unpublished decisions are decidedly precedential for reasons I explain in Part III; hence, I’m uncomfortable describing these decisions as “nonprecedential.” See *infra* notes 173–179 and accompanying text. Finally, as it turns out, a lot of “unpublished” decisions truly are “unpublished” in a meaningful sense.

<sup>39</sup> *Anasoff v. United States*, 223 F.3d 898, 903 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

our Founding.<sup>40</sup> Further, our understanding of precedent was very different in the eighteenth century than it is today, and reliance on judicial opinions themselves is a relatively recent invention.<sup>41</sup> Publication and precedential status generally were not linked until the creation of the categorically nonprecedential unpublished decision in the mid-twentieth century.<sup>42</sup>

As has been detailed before,<sup>43</sup> publication practices began shifting rapidly during the 1970s and 1980s to address a caseload explosion spurred in part by the expansion of federal civil rights and criminal laws.<sup>44</sup> Overburdened appellate courts used unpublished decisions—decisions that courts decide in advance are not binding—to save judicial time.<sup>45</sup> If unpublished decisions make no law, as the courts decreed, then judges need not say much to explain themselves.<sup>46</sup> Judges thought that relieving themselves of any elaborate reason-giving expectation in easy cases would free up judicial time for hard cases. To ensure time-saving, not only did courts restrict the precedential value

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<sup>40</sup> *Id.*

<sup>41</sup> See *Hart v. Massanari*, 266 F.3d 1155, 1165-66 (9th Cir. 2001) (“For centuries, the most important sources of law were not judicial opinions themselves, but treatises that restated the law, such as the commentaries of Coke and Blackstone. Because published opinions were relatively few, lawyers and judges relied on commentators’ synthesis of decisions rather than the verbatim text of opinions.”); *id.* at 1168 (“The modern concept of binding precedent—where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy—came about only gradually over the nineteenth and early twentieth centuries. Lawyers began to believe that judges made, not found, the law.”).

<sup>42</sup> See *Anasoff*, 223 F.3d at 903 (“Although they lamented the problems associated with the lack of a reporting system and worked to assure more systematic reporting, judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer’s unpublished memorandum.”).

<sup>43</sup> See Merritt E. McAlister, “Downright Indifference”: *Examining Unpublished Decisions in the Federal Appellate Courts*, 118 MICH. L. REV. 533, 542-48 (2020) (discussing the history of unpublished decisions); RICHMAN & REYNOLDS, *supra* note 20, at 3-8 (discussing appellate courts’ caseload explosion); *id.* at 10-21 (recounting the development of limited publication schemes to combat caseload crisis).

<sup>44</sup> See Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 204 (2001) (demonstrating that by 1985, the courts of appeals were only publishing 40.6% of their merits decisions).

<sup>45</sup> For an early examination of the difficulty of projecting into the future the anticipated precedential value of court decisions, see generally William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978).

<sup>46</sup> “Reasoned elaboration” is the cornerstone of legal process and the creation of precedent. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 143-52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 412 (1978) (“Explanation is normally a condition to performance of the rulemaking function, since rules ordinarily cannot emerge from an outcome unless the reasons for that outcome are given.”).

of these decisions by deciding not to publish them, but many courts—indeed, the majority—also prohibited their citation back to the issuing court.<sup>47</sup>

Unsurprisingly, this time-saving scheme raised a host of serious concerns—many of which William Reynolds and William Richman chronicled in their three decades' worth of work on unpublished decisions.<sup>48</sup> In response to that onslaught of criticism, beginning in 1990 and lasting into the mid-2000s, the Judicial Conference of the United States<sup>49</sup> began exploring a uniform response to the use of unpublished decisions across the circuits.<sup>50</sup> The courts were overrun with unpublished decisions,<sup>51</sup> yet until 2006 there were no uniform procedures governing their issuance, use, or precedential effect.<sup>52</sup>

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<sup>47</sup> Reynolds & Richman, *supra* note 45, at 1173–81 (discussing so-called “no-citation” rules); Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1430–31 (2005) (explaining that, before Federal Rule of Appellate Procedure 32.1, ten of the thirteen circuit courts either forbade citation to unpublished decisions or discouraged their use).

<sup>48</sup> See generally RICHMAN & REYNOLDS, *supra* note 20 (summarizing their work on unpublished decisions in federal appellate courts). The literature raising objections to no-citation rules is significant and varied; it is also beyond the scope of this Article. See, e.g., Charles L. Babcock, *No-Citation Rules: An Unconstitutional Prior Restraint*, 30 LITIG. 33 (2004) (criticizing no-citation rules as “bear[ing] all the indicia of a prior restraint”); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of No-Citation Rules*, 3 J. APP. PRAC. & PROCESS 287 (2001) (suggesting that no-citation rules may interfere with First Amendment rights of speech and petition); Kenneth Anthony Laretto, Note, *Precedent, Judicial Power, and the Constitutionality of ‘No-Citation’ Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037 (2002) (criticizing the excess discretion awarded to judges to choose not to publish a decision); David S. Caudill, *Parades of Horribles, Circles of Hell: Ethical Dimensions of the Publication Controversy*, 62 WASH. & LEE L. REV. 1653 (2005) (discussing several concerns related to no-citation rules described as a “parade of horrors”); see also Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 759 (2008) (“With the availability of unpublished opinions, the original reasons for no-citation rules no longer justify their continued existence.”); J. Lyn Entrikin Goering, *Legal Fiction of the “Unpublished” Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27, 92 (2005) (“The conflicting local rules of the federal circuits regarding the citation of unpublished decisions raise puzzling questions about whether federal courts of appeals have a right to prevent attorneys and litigants from referencing opinions that the courts have no practical ability to keep out of the public eye.”).

<sup>49</sup> The Judicial Conference frames policy guidelines for administration of the federal courts. 29 U.S.C. § 331. As the reporter for the Advisory Committee recounts in exceptional detail, the Judicial Conference initially refused to consider rulemaking in this area—but the issue kept coming up, again and again. See Schiltz, *supra* note 47, at 1436–58 (noting persistent opposition to rule-making efforts).

<sup>50</sup> These efforts took so long, in part, because the federal appellate bench opposed uniform rulemaking on unpublished decisions; it routinely objected to efforts to consider predecessor versions of Rule 32.1, which ultimately was approved in 2006—more than fifteen years after the study began. See Schiltz, *supra* note 47, at 1432–58 (discussing history of rule-making efforts related to unpublished decisions and describing “highly emotional support and opposition” to reform efforts over sixteen-year period).

<sup>51</sup> The rate of unpublished cases in 2000 was already almost eighty percent. ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS OF THE U.S. COURTS tbl.S-3 (2000). Today, that rate has risen to nearly ninety percent. 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12.

<sup>52</sup> Even now, the only court-wide rule on unpublished decisions, Federal Rule of Appellate Procedure 32.1, is meager. Regulation of unpublished decisions has devolved to the circuits themselves, and the practice is subject to significant circuit-level variation due, perhaps, to circuit-

Technological innovations—or so we thought—gave the courts a reason to reconsider restrictions on the use of unpublished decisions; electronic access and even publication of unpublished decisions had rendered the moniker “unpublished” a bad fit by the early 2000s.<sup>53</sup> Before federal “unpublished” decisions became widely available, some argued it was unfair to permit parties to cite them because not every litigant had equal access to these decisions.<sup>54</sup> But in September 2001, West began printing the *Federal Appendix*, a publication devoted unironically to “unpublished” decisions from the U.S. Courts of Appeals.<sup>55</sup> Unpublished decisions were also made widely available by that time through West’s on-line commercial database, Westlaw.<sup>56</sup> Equally important, it was thought that any lingering “access” challenges to federal unpublished decisions would soon be overcome.<sup>57</sup> “[A]s of December

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specific customs and culture. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 368-73 (2011) (examining circuits’ different case-management priorities and how those priorities may affect court processes).

<sup>53</sup> Goering, *supra* note 48, at 34 n.24; see also Levi, *supra* note 36, at 1801-02 (noting that while “[b]efore electronic publishing, an unpublished opinion was truly unpublished,” the term had become “a misnomer given that all opinions are now published and available electronically”); Patrick J. Schiltz, Comments, in Edward R. Becker, et al., *The Appellate Judges Speak*, 74 FORDHAM L. REV. 1, 4 (2005) (“Of course, the phrase ‘unpublished opinions’ is a misnomer, especially now with the *Federal Appendix*, because these opinions are published, not only in the *Federal Appendix* but in numerous other sources . . .”).

Even as early as 1990, the Federal Courts Study Committee—a committee convened by Congress to study the courts—observed that “inexpensive database access and computerized search technologies may justify revisiting the issue [of the no-citation bans], because these developments may now or soon will provide wide and inexpensive access to all opinions.” FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130-31 (1990), <https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf> [<https://perma.cc/4GN7-RCPN>].

<sup>54</sup> See FED. JUD. CTR., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: A PRELIMINARY REPORT 18 (Apr. 14, 2005), <http://www.nonpublication.com/fjcprelim.pdf> [<https://perma.cc/C8F5-KXMS>] (“A strong historical reason for restricting citation to unpublished opinions was the fact that many attorneys did not have easy access to them. But now that so many unpublished opinions are available electronically, this reason appears to have less force.”).

<sup>55</sup> See Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 2 (2002) (discussing creation of West’s *Federal Appendix* as a “startling action that drains the meaning from the term ‘unpublished’ opinion”).

<sup>56</sup> Lexis and Westlaw both had made unpublished decisions available in their courts of appeals databases “for a number of years” before the *Federal Appendix* arrived. Joseph L. Gerken, *A Librarian’s Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 475 (2004) (“Westlaw and LexisNexis have, for a number of years, included unpublished opinions in their federal courts of appeals databases, and attorneys and other researchers have thus had much greater access to the text of these decisions than in the past.”).

<sup>57</sup> There were some anomalous access issues at the time. For example, the Fifth and Eleventh Circuits were late to make their unpublished decisions available to the electronic databases. See *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Int. & Intell. Prop. of the H. Comm. on the Judiciary*, 107th Cong. 42, 46 (2002) [hereinafter Hellman Statement] (statement of Arthur D. Hellman, Professor of Law, University of Pittsburgh School of Law) (discussing electronic access issues for unpublished decisions). And the Third Circuit, curiously, made available on its website unpublished decisions in *counseled* cases only. *Id.* at 46 n.5. Whether any circuits continue that practice today is unclear—it is not an issue disclosed in local rules—but it could

17, 2004,” one scholar wrote at the time, “every federal circuit will be required to provide the public internet access to all its written opinions, whether designated for ‘publication’ or not.”<sup>58</sup>

The reason for the optimism? A little-known law called the E-Government Act of 2002.<sup>59</sup> That promising legislation obligated each federal court, by December 2004, to maintain its own website with “[a]ccess [through that website] to the substance of all written opinions . . . in a text-searchable format”—“regardless of whether such opinions are to be published in the official court reporter.”<sup>60</sup> Scholars were hopeful that the E-Government Act would resolve any lingering access issues wrought by the move to electronic distribution of court decisions.<sup>61</sup>

After extensive study and negotiation, in 2006 the Advisory Committee ultimately recommended—and approved—a rule lifting the restrictions on citation to federal unpublished decisions that were still in effect in some circuits.<sup>62</sup> Under Federal Rule of Appellate Procedure 32.1, no circuit may restrict the citation of any “federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.”<sup>63</sup>

As the advisory committee itself acknowledged, Rule 32.1 is “extremely limited” in effect; it did nothing to alter the status quo other than to lift all restrictions on the citation to federal unpublished decisions in federal

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account for a significant portion of “missing decisions.” The First Circuit dataset discussed below, however, suggests that at least in that circuit such an assumption would be both overinclusive and underinclusive.

<sup>58</sup> See Goering, *supra* note 48, at 34 n.24 (observing that “as of December 17, 2004 . . . every federal circuit will be required to provide the public internet access to all its written opinions, whether designated for ‘publication’ or not”).

<sup>59</sup> E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899 (codified as amended in scattered sections of 44 U.S.C.).

<sup>60</sup> *Id.* § 205(a)(5), 116 Stat. at 2913 (codified at 44 U.S.C. § 3501 note). Specifically, the statute requires that

[t]he Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information: . . . Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

§ 205(a) (codified at 44 U.S.C. § 3501 note).

<sup>61</sup> See FED. JUD. CTR., *supra* note 54, at 18 (“Twelve attorneys mentioned how accessible unpublished opinions are now, but 14 attorneys said that unpublished opinions are still often less accessible than published opinions.”); see also Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 105 (1999) (recognizing that approximately one-third of affirmances in employment discrimination cases were not available on commercial databases in part because certain circuits “do not make their unpublished opinions available to any electronic source”).

<sup>62</sup> FED. R. APP. P. 32.1 advisory committee notes (2006 amendments).

<sup>63</sup> FED. R. APP. P. 32.1(a).

appellate courts.<sup>64</sup> Whether by rule or court decision, unpublished decisions continue to be nonbinding in every circuit.<sup>65</sup> But they are usable—and have been for over a decade—despite their limited precedential value.

Today, unpublished decisions dominate the output of the federal appellate courts. Only approximately twelve percent of the merits terminations of the courts of appeals end in published decisions that bind lower courts and future litigants.<sup>66</sup> Until now, though, we thought we had access to unpublished decisions in equal measure, thereby making the distinction between the categories one of precedential effect, not of access. We were wrong.

### B. *What We Now Know*

Neither technology nor the E-Government Act has ensured uniform, navigable access to all federal appellate decisions (regardless of whether they are published or not). A sizable portion of the work of the federal courts of appeals remains locked away behind PACER's difficult-to-use paywall.<sup>67</sup> These decisions are not findable on the appellate courts' free and public websites; they, in turn, are not picked up by Westlaw, Lexis, or Bloomberg Law; and, to make matters worse, courts only sporadically share decisions

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<sup>64</sup> See FED. R. APP. P. 32.1 advisory committee notes (2006 amendments) (“[Rule 32.1] does not require any court to issue an unpublished opinion or forbid any court from doing so. . . . It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court.”).

<sup>65</sup> In every circuit, decisions that are not designated for publication are not binding precedent. *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 219 (4th Cir. 2006); 1ST CIR. R. 32.1.0; 2D CIR. R. 32.1.1; 3D CIR. INTERNAL OPERATING PROC. 5-1, 5-2, 5-3; 5TH CIR. R. 47-5-4; 7TH CIR. R. 32.1(b); 8TH CIR. R. 32.1A; 9TH CIR. R. 36-3(a); 10TH CIR. R. 32.1(A); D.C. CIR. R. 36(e)(2); 11TH CIR. R. 36; 11TH CIR. INTERNAL OPERATING PROC. 6.

<sup>66</sup> 2017 JUDICIAL BUSINESS, *supra* note 8, tbl.B-12.

<sup>67</sup> Unless sealed or otherwise protected from disclosure, all documents filed with the courts, including court orders and opinions, are publicly available on PACER. *Frequently Asked Questions: What Information is Available Through PACER*, PACER, <https://pacer.uscourts.gov/help/faqs/what-information-available-through-pacer> [<https://perma.cc/6RAZ-PCKE>]. But the problems with PACER are legion. PACER is a difficult, and expensive, system to use. Its fees can be high and frustrate the goals of public access. See Mackenzie Arthur, *Invisible Shackles: The Monopolization of Public Access Legal Research Due to Government Failures*, 19 HOUS. BUS. & TAX L.J. 123, 140 (2019) (“Although case opinions are free, a 10-cent per page fee is imposed by the system for other documents like pleadings and motions. As such, one can accumulate charges without knowing whether the document is relevant.”); see also Stephen J. Schultze, *The Price of Ignorance: The Constitutional Cost of Fees for Access to Electronic Public Court Records*, 106 GEO. L.J. 1197, 1213 (2018) (“PACER provides no meaningful mechanism for nonparties to receive notice of new activity on a given case, and it is often impossible to determine in advance how much the results of a search will cost.”).

PACER also lacks a keyword-search function, indexing, and a multi-jurisdictional search tool for filed documents. See Elizabeth Y. McCuskey, *Clarity and Clarification: Grable Federal Questions in the Eyes of Their Beholders*, 91 NEB. L. REV. 387, 443 (2012) (“[S]earching PACER for legal issues, as opposed to case-identifying information, is lugubrious.”).

with FDsys, the only free, consolidated, government-run legal research tool for federal court opinions.<sup>68</sup>

All four resources—Westlaw, Lexis, Bloomberg Law, and FDsys—depend on the courts themselves for access to judicial decisions. Historically, the courts sent opinions directly to the databases.<sup>69</sup> Now, the databases depend on public sources—court websites and PACER, primarily—to retrieve federal court opinions.<sup>70</sup> FDsys, on the other hand, receives opinions through a bridge with the federal courts' CM/ECF docketing system.<sup>71</sup> For the decision to be received, someone on the court's side must indicate that the decisions should

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<sup>68</sup> The rudimentary PACER system is not the only government-run electronic research tool for legal research. The U.S. Government Printing Office ("GPO") also runs a database of government documents, known as the Federal Digital System or "FDsys," that includes federal court opinions. Amy Pearce, *Goodbye, GPO Access, Hello, FDsys*, WYO. LAW., June 2012, at 34, 34. FDsys is available at [www.govinfo.gov](http://www.govinfo.gov). In 2013, the Judicial Conference approved a pilot project to send court opinions directly to the GPO for inclusion in FDsys. Press Release, Admin. Off. of the U.S. Cts., Access to Court Opinions Expands [hereinafter Access Expands], Jan. 31, 2013, <https://www.uscourts.gov/news/2013/01/31/access-court-opinions-expands> [<https://perma.cc/4HR7-ZPA2>].

Unlike PACER, opinions on FDsys "are text-searchable across opinions and courts." *Id.* Indeed, the Administrative Office lauded the FDsys project as one that would "allow[] the Judiciary to make its work more easily available to the public." *Id.* Within a year, FDsys court participants grew to sixty-four, and the Administrative Office claimed that more than 750,000 opinions were available on FDsys dating back to 2004. Press Release, Admin. Off. of the U.S. Cts., 64 Federal Courts Now Publish Opinions on FDsys, Nov. 13, 2013, <https://www.uscourts.gov/news/2013/11/13/64-federal-courts-now-publish-opinions-fdsys> [<https://perma.cc/N5FT-D7L5>]. Even before that expansion, according to the Administrative Office, federal court opinions were "already one of the most heavily used collections on FDsys, with millions of retrievals each month." Access Expands, *supra*.

In 2016, FDsys migrated to "govinfo," "a new, upgraded platform for accessing federal government information," that "replicates the functionality and content on FDsys." Erik Beck, *Introducing Govinfo: A New Source for Federal Government Documents Online*, COL. LAW., Feb. 2017, at 73, 73. The improved platform continues to have coverage gaps, as not all courts have opted into posting opinions on the GPO system. The appellate courts have opted into coverage, but coverage remains spotty year over year, as I will discuss in Part II and show in the Appendix. *See also* Martin, *supra* note 16, at 315-16 (describing coverage of FDsys as including "all twelve regional circuit courts of appeals").

<sup>69</sup> E-mail from Sue Moore, Academic Account Manager, Thomson Reuters, to Merritt E. McAlister, Assistant Professor of Law, University of Florida Levin College of Law (Aug. 6, 2019, 10:16 AM) ("Historically, the federal courts of appeals sent or e-mailed decisions to Westlaw for inclusion in our content.") (relaying information from Amanda Kenny, Product Developer, Thomson Reuters) (on file with author).

<sup>70</sup> *Id.* ("Today, however, Westlaw proactively acquires the documents through PACER or court websites. By obtaining decisions directly from PACER or the court websites, Westlaw is able to obtain decisions it would not otherwise have had, as well as individual court orders requested by customers.") (relaying information from Amanda Kenny, Product Developer, Thomson Reuters) (on file with author); E-mail from Vicki K. Pyles, *supra* note 32 ("For federal courts, we generally collect opinions from the court websites or PACER."); E-mail from Tiffany Lozano, *supra* note 32 (similar).

<sup>71</sup> According to an Administrative Office press release, the GPO system can "pull[] opinions nightly from courts' Case Management/Electronic Case Files (CM/ECF) systems and send[] them to the GPO, where they are processed and posted on the FDsys website." Access Expands, *supra* note 68.

be shared, which requires a CM/ECF user to indicate the decision is a “written opinion” within the meaning of the E-Government Act.<sup>72</sup>

What the databases ultimately recover from court websites is a lot less than what the courts produce—at least, it is a lot less than what the courts *say* they produce. Comparing the courts’ self-reported number of “merits terminations” with the number of database hits during the same corresponding time period reveals a nontrivial shortfall.<sup>73</sup> That shortfall is consistent across the major commercial databases, but it varies among the circuits—suggesting that the courts, and not the databases, have disparate practices.

A word about terminology before I proceed further. “Merits terminations” is a term-of-art used, but not entirely defined, by the Administrative Office of the U.S. Courts in its statistical reporting.<sup>74</sup> Although the Administrative Office does not define “merits,” “merits” terminations are opposed to “procedural” ones, which are separately reported.<sup>75</sup> “Terminations” count the “Last Opinion or Final Order,” whether reasoned or not, whether signed by a judge or not, and whether written or not.<sup>76</sup>

“Merits terminations” occur in what we might traditionally think of as “appeals as of right,” as well as proceedings that originate in the appellate courts themselves, which I discuss below. Appeals as of right are decisions over which the U.S. Courts of Appeals have mandatory appellate jurisdiction, including final judgments from the district courts;<sup>77</sup> certain orders that are sufficiently final for purposes of appeal;<sup>78</sup> interlocutory orders granting or denying injunctive relief;<sup>79</sup> and appeals from certain administrative agency decisions.<sup>80</sup> Throughout this Article, I will use the term “appeals as of right” to identify traditional appellate decisions that affirm, vacate, remand, or reverse district court decisions (or enforce or vacate agency action).

Not all proceedings in the federal appellate courts involve appeals as of right; discretionary relief is sought in a variety of circumstances, including requests for permission to appeal and requests for extraordinary relief. The U.S. Courts of Appeals have discretionary jurisdiction over some nonfinal orders,<sup>81</sup> writs,<sup>82</sup>

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<sup>72</sup> Martin, *supra* note 16, at 320.

<sup>73</sup> See *infra* Section II.A (describing data collection efforts).

<sup>74</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12.

<sup>75</sup> *Id.* tbl.B-5A.

<sup>76</sup> *Id.* tbl.B-12.

<sup>77</sup> 28 U.S.C. § 1291.

<sup>78</sup> Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-47 (1949).

<sup>79</sup> § 1292(a).

<sup>80</sup> § 1296.

<sup>81</sup> § 1292(b).

<sup>82</sup> § 1651(a).



and many habeas corpus proceedings.<sup>83</sup> Throughout this Article, I will use the umbrella term “original proceedings” as a shorthand to refer to discretionary proceedings not involving mandatory-jurisdiction appeals as of right.

All told, of these “merits terminations” from appeals as of right and original proceedings, nearly thirty percent remain out of easy reach.<sup>84</sup> These decisions are essentially only usable if we know they exist already and can use certain case information—for example, a case name or number—to locate the decision on PACER. These decisions would not be locatable using traditional keyword searching, because PACER does not offer that feature.<sup>85</sup> PACER’s limitations therefore render the missing decisions largely useless to all but the judges and court staff that worked on a particular case and the parties that received the decision. That kind of limited access is a problem that technology and the E-Government Act were thought to have solved more than a decade ago. They didn’t.

But this is only two-thirds of the story. Merits terminations—which are the focus of this Article—account for only approximately two-thirds of all appellate-level dispositions in the federal courts. Approximately one-third of all appeals are resolved through procedural dismissals.<sup>86</sup> The vast majority of procedural terminations are in a “black box.”<sup>87</sup> Courts generally do not make procedural terminations available as easily and freely as merits terminations. That choice may make a good deal of sense for dismissals based on failure to prosecute an appeal, but it makes less sense when the dismissal is for jurisdictional reasons. We know far less about procedural terminations, including how many result in published decisions. The First Circuit dataset discussed in Part II suggests that we nevertheless have access to at least some procedural terminations on commercial databases (approximately eleven percent of the procedural terminations issued during the study period were available).<sup>88</sup> Some of these available procedural decisions are reasoned; others

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<sup>83</sup> See § 2241 (authorizing circuit judge to entertain an original application for a writ of habeas corpus); § 2253(c) (requiring habeas corpus petitioner to seek certificate of appealability to appeal adverse decision); § 2244(b)(3) (requiring courts of appeals to authorize second or successive habeas corpus applications under § 2254 and § 2255).

<sup>84</sup> See *infra* Section II.B.

<sup>85</sup> See McCuskey, *supra* note 67, at 443 (“PACER, by contrast, is comprehensive but not yet text-searchable, multi-jurisdictional, or indexed as finitely—so searching PACER for legal issues, as opposed to case-identifying information, is lugubrious.”).

<sup>86</sup> Compare 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-5 (merits terminations), with *id.* tbl.B-5A (procedural terminations).

<sup>87</sup> Kagan et al., *supra* note 17, at 688; see also David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Decisions*, 62 WASH. & LEE L. REV. 1667, 1670 (2005) (using the same language to describe this “largely invisible and poorly understood” process).

<sup>88</sup> See *infra* Table 7 (summarizing the First Circuit dataset).

are, inexplicably, the kinds of procedural terminations that we might not expect to find (for example, voluntary dismissals by the appellant or both parties).<sup>89</sup>

In their recent work, Kagan, Gill, and Marouf divvied up the world of federal appellate output into four categories, based on relative usable access to that output: (1) “[p]recedent decisions”; (2) “[n]onprecedent, visible decisions”; (3) “[n]onprecedent, invisible decisions”; and (4) “[n]onmerits decisions (invisible).”<sup>90</sup> Although I agree with their focus on the relative visibility of the courts’ work, I take issue with their use of “precedent” because even unpublished decisions can be understood broadly as “precedent.” Even though “unpublished” decisions are not *binding*, these decisions nevertheless implicate the core reasons for why a “decisionmaking mechanism [might] incorporate substantial precedential constraints”: concerns for judicial decisionmaking fairness, efficiency, and predictability.<sup>91</sup>

I suggest, instead, that we focus on three tiers of federal appellate work: (1) visible/accessible binding decisions; (2) visible/accessible nonbinding decisions; and (3) invisible/inaccessible nonbinding decisions. “Decisions” is a broad term that captures more formal opinions, as well as less formal judgments and orders; “decisions” includes any “final order or opinion,” which the Administrative Office reports as terminations.<sup>92</sup> Some of these decisions will be procedural and some will be on the merits. “Binding” refers to a decision that (by virtue of the publication signal) will have a binding effect on future cases and on lower courts. “Nonbinding” decisions, then, are decisions that the appellate panel does not agree to follow in future cases; these are decisions that affect only the parties themselves, though they may be used by others persuasively. The visibility status describes decisions that are available on court websites and in commercial databases.

This classification scheme redirects our attention to what are the defining attributes of federal appellate decisions: their visibility/accessibility and their binding/nonbinding effect. In resolving the appeals before them, the federal courts appear to tailor their output along both of these dimensions. Not all decisions will bind others, and not all decisions will be as easily accessible and visible to the public as the decisions that do bind. My classification focuses on the core features of the appellate courts’ decisional classification and

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<sup>89</sup> See, e.g., *SimpliVity Corp. v. Bondranko*, No. 16-2169, 2016 WL 9665544, at \*1 (1st Cir. Oct. 6, 2016) (“Upon consideration of appellant’s unopposed motion, it is hereby ordered that this appeal be voluntarily dismissed pursuant to Fed. R. App. P. 42(b).”).

<sup>90</sup> Kagan et al., *supra* note 17, at 689; see also Vladeck & Gulati, *supra* note 87, at 1670 n.8 (using similar taxonomy).

<sup>91</sup> See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-99 (1987) (discussing core values of a precedential system); see also McCuskey, *supra* note 16, at 551-52 (arguing that district court decisions should be broadly understood as precedent, even if not binding on others).

<sup>92</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12.

issuance scheme: visibility and constraint.<sup>93</sup> I am less focused on whether the final decision is procedural (for example, a dismissal of an appeal for lack of jurisdiction) or substantive (for example, an affirmance of a summary judgment decision). Both types of decisions may have value, may be accessible or inaccessible, and may constrain or not constrain.

The scheme as I describe it here also suggests that there may be a third tier of appellate justice in the federal system. Richman and Reynolds' powerful work revealed a two-tier appellate justice system in the U.S. Courts of Appeals.<sup>94</sup> They describe a first-tier process, whereby the system's have receive careful judicial scrutiny, oral argument, and reasoned, published decisions.<sup>95</sup> The system's have-nots, on the other hand, rarely receive oral argument, their decisions are resolved by judicial staff attorneys with little oversight, and their appeals end in short, perfunctory unpublished decisions.<sup>96</sup> The unpublished decision itself is a signal of second-tier treatment.<sup>97</sup> But the original empirical work described in the next Part will reveal there is another category, still: decisions thought so unimportant, uninteresting, or unremarkable that courts resolve them without formal "opinions," thereby

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<sup>93</sup> This classification scheme draws no distinction between procedural terminations and merits terminations, as Kagan, Gill, and Marouf's does. The reason for failing to do so is two-fold: First, and foremost, I will ultimately argue for free and total access to all federal appellate judge-ordered terminations; because I want to mitigate the possibility of court screening based on decisional issuance schemes, I don't see much value in drawing a sharp distinction between procedural and merits terminations in defining the right to our free access (though my reform proposal will draw a distinction between judicial and clerk-ordered procedural terminations). Second, the types of orders that resolve "merits" terminations and "procedural" terminations are not always that distinct; both types of terminations can occur through perfunctory orders or judgments. It appears that the type of order, as opposed to the type of termination, may play a more significant role in determining our relative access to the termination. Because my classification scheme focuses on access, it seems less useful to subdivide the categories further into procedural and merits terminations.

<sup>94</sup> See RICHMAN & REYNOLDS, *supra* note 20, at 116, 119-20 (describing appellate triage system).

<sup>95</sup> See *id.* at 119-20. They provide an example of

a litigant in an 'important' antitrust or securities case, one who is represented by serious counsel, [which] will get the full Learned Hand treatment. There will be oral argument, an opinion prepared by the judge and her staff, and the result will contain a sufficiently detailed explanation so that the whole world can second-guess the result—and have an informed idea as to the state of the law.

*Id.*

<sup>96</sup> *Id.* at 120. And they provide a counterexample:

A litigant who is poor, without counsel, and with a boring, repetitive problem, on the other hand, can expect only the second-hand treatment that is available on Track Two. Because Track Two provides so little information to the litigants or to the parties, no one can even guess as to the quality of the justice handed out on that track.

*Id.*

<sup>97</sup> See McAlister, *supra* note 43, at 567-68 (explaining the relationship between unpublished decisions and the second-tier appellate justice system).

locking a class of decisions away behind PACER's paywall. The "third tier," then, are those decisions beneath unpublished visible decisions, which are the mainstay of the second tier. The third tier is a body of appellate decisions that are missing from the most widely used legal research tools.

## II. WHAT'S MISSING FROM LEGAL DATABASES

This Part will explain how our navigable access to unpublished decisions is not—and likely never has been—what we thought it was. It will detail the extent of what's missing throughout the circuits and offer some insight into how those decisions escape the reach of commercial databases. It begins by describing the process I used to compile the data that prove the existence of submerged appellate precedent. Then it analyzes the data for two recent Administrative Office reporting years (2017 and 2018); data for earlier years appear in the Appendix. This Part will also consider a dataset of missing decisions from the First Circuit to explain how decisions go missing and evaluate the content of missing decisions.

### A. *The Data-Collection Process*

To determine the extent of what's missing, I compared publicly available data from the Administrative Office for the U.S. Courts with database hits from each commercial database. This is not exactly an apples-to-apples comparison, so let me explain first what the baseline Administrative Office data include and then I'll discuss the commercial database search process.

The Administrative Office reports on appellate terminations each year in two categories: "merits" terminations and "procedural" terminations.<sup>98</sup> Nearly all of the scholarly work on unpublished decisions focuses on "merits" terminations from the U.S. Courts of Appeals.<sup>99</sup> That's because the only data the Administrative Office makes publicly available on publication status concerns "[o]pinion[s] or [o]rder[s]" in cases "[t]erminated on the [m]erits,"<sup>100</sup> as described in Table B-12 of the annual *Judicial Business* report.<sup>101</sup> The data discussed here likewise derive from Table B-12.

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<sup>98</sup> Compare 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12 (merits terminations), with *id.* tbl.B-5A (procedural terminations).

<sup>99</sup> See, e.g., Kagan et al., *supra* note 17, at 696 (omitting procedural terminations from authors' analysis).

<sup>100</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12.

<sup>101</sup> Because the Administrative Office reports data on published and unpublished decisions on a rolling twelve-month basis ending in September 30 of each year, the "year" for each data point runs from October 1 to September 30. *E.g., id.*

Although Table B-12 does not break down “merits” terminations by nature of suit,<sup>102</sup> it does provide some insight into whether “merits” terminations are reasoned or not. The Administrative Office reports on “Signed” and “Reasoned, Unsigned” final opinions/orders, and these categories “[i]nclude[] only opinions and orders which expound the law as applied to the facts of the case and detail the judicial reasons upon which the judgment is based.”<sup>103</sup> Separately, the Administrative Office reports on “unsigned, without comment” merits terminations, which appear to be unreasoned—meaning, orders that do not “expound the law as applied to the facts of the case.”<sup>104</sup>

For the court-issued terminations baseline—that is, for the number of annual appellate terminations each database should have—I used postconsolidation<sup>105</sup> “merits” terminations numbers from Table B-12 for each circuit. These numbers included both published and unpublished terminations. I also included in that baseline unreasoned or “without comment” decisions. No commercial database reported omitting terminations because they issued without reasoning.<sup>106</sup>

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<sup>102</sup> Other tables in *Judicial Business* do, however. Courts report “merits” terminations in eight broad categories: “Criminal,” “U.S. Prisoner Petitions,” “Other U.S. Civil,” “Private Prisoner Petitions,” “Other Private Civil,” “Bankruptcy,” “Administrative Agency Appeals,” and “Original Proceedings and Miscellaneous Applications.” *Id.* tbl.B-5. Most of these categories are self-explanatory, but some are not. “Private Prisoner Petitions” includes nonfederal prisoners (e.g., state prisoners). *Id.* “Prisoner Petitions,” more generally, includes both habeas corpus and civil rights filings from prisoners. *Id.* tbl.B1-A (identifying subcategories of cases within the eight major categories). Neither prisoner category includes habeas corpus proceedings filed originally in the appellate courts, requests to file second or successive habeas petitions, or requests for certificates of appealability—all of which are within the “Original Proceedings and Miscellaneous Applications” category (along with other requests to appeal). FED. R. APP. P. 22; 16AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, *FEDERAL PRACTICE AND PROCEDURE* § 3968, at 72, 75, § 3968.1, at 76, 83-84 (4th ed. 2008). These categories of appeals—criminal, private prisoner, U.S. prisoner, and original proceedings, specifically—comprise approximately sixty percent of all appellate proceedings terminated on the merits and overwhelmingly involve pro se litigants, which are approximately half of all appellants in the federal system. McAlister, *supra* note 43, at 555, 555 fig.6; 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-5.

<sup>103</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12.

<sup>104</sup> *Id.*

<sup>105</sup> A word about consolidation on appeal: A certain number of appeals are resolved or terminated through consolidation; I used decisional numbers that accounted for and removed consolidated decisions. *Id.* So, if three cases are consolidated into one, that would only count as one merits termination. The Administrative Office tracks terminations through consolidation for appeals resolved both on the merits and on procedural grounds. *See id.* (listing total terminations and terminations through consolidation); *id.* tbl.B-5A (same).

<sup>106</sup> *See* E-mail from Sue Moore, Academic Account Manager, Thomson Reuters, to Merritt E. McAlister, Univ. of Fla. Levin Coll. of L. (Aug. 16, 2019, 10:16 AM) (relaying information from Amanda Kenny, Product Developer, Thomson Reuters) (on file with author) (“In terms of what Westlaw chooses to include in our content, we generally do not include ‘housekeeping’ orders. Additionally, correcting orders are incorporated and merged into the original orders, rather than published separately. Westlaw does not exercise any discretion in terms of the content of decisions or orders.”). A representative at LexisNexis described their policy:

I did not, however, include “procedural” terminations in my baseline.<sup>107</sup> A significant number of appeals as of right and original proceedings terminate on procedural grounds. For the twelve-month period ending on September 30, 2018, for example, only approximately sixty-two percent of terminations were on the merits, while one-third of terminations were on procedural grounds (the remaining five percent of terminations were appeals resolved through consolidation, which I excluded from all calculations).<sup>108</sup> Procedural terminations include dismissals for jurisdictional defects, voluntary dismissals under Federal Rule of Appellate Procedure 42, dismissals for defaults, and dismissals resulting from procedural defects in the request for a certificate of appealability.<sup>109</sup> Either a judge (or two or three)<sup>110</sup> may issue a procedural termination; other times, the clerk’s office can dispose of the appeal on procedural grounds (in the case of voluntary dismissals and some kinds of procedural defaults).<sup>111</sup> Of the procedural terminations during the 2018 reporting period, nearly twenty percent were judicial procedural dismissals for jurisdictional reasons, while seventy-five percent were dismissals from the clerk’s office (often for want of prosecution/default or due to voluntary dismissal under Rule 42).<sup>112</sup> The following graph breaks down the relative percentage of procedural terminations by judges and clerk’s offices during the 2018 reporting period.

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The Lexis policy at the appellate level, both federal and state, is to collect all substantive, written opinions. Depending on the jurisdiction, our collection guidelines may limit the collection of purely procedure orders, e.g., a routine scheduling order. However, the length of the document does not determine its substantive value, as a one-word affirmance would be highly valuable as part of the overall case history in Shepard’s.

E-mail from Vicki K. Pyles, *supra* note 32.

<sup>107</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-5A.

<sup>108</sup> Compare *id.* tbl.B-5 (merits terminations), with *id.* tbl.B-5A (procedural terminations). See also *supra* note 105 (discussing consolidation).

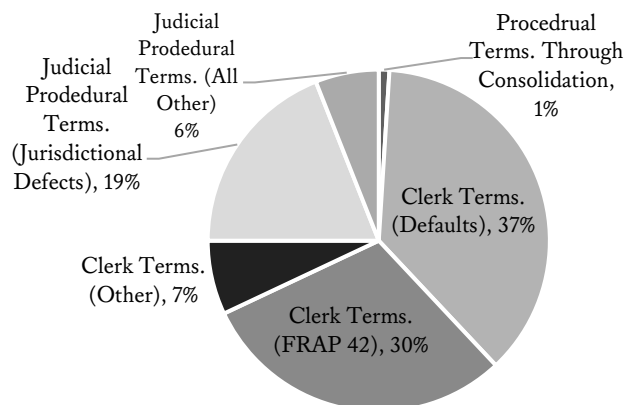
<sup>109</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-5A. A decision to grant or deny a certificate of appealability on the merits of the request is a “merits” termination. See *id.* tbl.B-5.

<sup>110</sup> Some procedural terminations result from one-judge orders; others from two-judge orders; and still others receive a full panel. See, e.g., 11TH CIR. R. 27-1(d)(2) (single judge may rule on certificates of appealability); *id.* 27-1(e) (authorizing two-judge panels for specified motions); 3D CIR. R. 27.5 (describing powers of single judge).

<sup>111</sup> See, e.g., FED. R. APP. P. 42(b); 11TH CIR. R. 42(a), (b) (“The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement . . . .”); 3D CIR. R. 24.2 (discussing dismissals for failure to file).

<sup>112</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-5A.

Figure 1: Procedural Terminations in 2018 by Type of Resolution



The bottom line: the majority of procedural dismissals involve administrative, and not judicial, action. To that end, many procedural terminations likely issue without much or any reasoning, and therefore we might not expect that these decisions would find their way to a commercial database. But that is not true of *all* procedural terminations, of course. Some terminations for jurisdictional reasons by the court will have public value—possibly significant public value. Indeed, some procedural terminations result in precedential, published decisions.<sup>113</sup> Dismissals by the clerk’s office, on the other hand, generally are only descriptive, as clerk’s office terminations only occur by agreement of the parties<sup>114</sup> or after the appellant fails to prosecute the appeal (assuming notice of such dismissal has been given).<sup>115</sup>

Because the commercial databases generally do not catalogue “housekeeping” orders,<sup>116</sup> and because few of those orders are findable without using the fee-based PACER system, I therefore did not include procedural termination numbers in my baseline comparisons. Even if these decisions have public value, the commercial databases generally do not pick them up (and the First Circuit dataset suggests that databases pick up only about ten percent of procedural terminations).<sup>117</sup> What is reasonable to expect, and what the commercial databases indicate we should expect, is that all postconsolidation “merits terminations” are available on Westlaw, Lexis,

<sup>113</sup> See, e.g., *Flores v. Barr*, 934 F.3d 910, 918 (9th Cir. 2019) (“We dismiss the appeal for lack of jurisdiction.”); *Jackson v. Curry*, 888 F.3d 259, 261 (7th Cir. 2017) (“Lacking jurisdiction, we dismiss the appeal.”).

<sup>114</sup> FED. R. APP. P. 42(b).

<sup>115</sup> See, e.g., 11TH CIR. R. 42-1(b) (describing failure-to-prosecute procedures).

<sup>116</sup> See *supra* note 106 (discussing content decisions of commercial databases).

<sup>117</sup> See *infra* subsection II.C.2 (discussing decisions in First Circuit dataset).

and Bloomberg Law. That is why I used postconsolidation merits termination numbers as a baseline for the comparisons discussed below.

Before I describe how I obtained the commercial database data, I should note that there is reason for some concern over the reliability of Administrative Office data.<sup>118</sup> But researchers have suggested that data are likely to be “highly reliable” where a variable “is useful to track court workload or assign resources.”<sup>119</sup> The data I rely on here generally fall into those more reliable categories, though transcription errors in that data are possible.<sup>120</sup> I am doubtful, however, that transcription errors alone account for the disparities discussed in the next part (and confirmed by the close examination of missing decisions from the First Circuit).<sup>121</sup>

Now, I turn to the commercial database data. To obtain the database comparators, I ran searches in Westlaw, Lexis, and BloombergLaw’s opinions or cases databases limited to the particular circuit (excluding district court cases) for the same corresponding time period as each Administrative Office table. For Westlaw, I searched the “Circuit Court of Appeals Cases” database for each geographic circuit using the following advanced search term to obtain data corresponding with the twelve-month period ending on September 30, 2017: DA(aft 09-30-2016 & bef 10-01-2017). I changed the advanced search term to “09-30-2015” and “10-01-2016,” for the previous twelve-month period and the years that followed until the twelve-month period beginning on 10-01-2007. I then recorded the number of hits obtained for that period without any additional filtering on the search results.

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<sup>118</sup> According to one author,

Legal scholars have long been suspicious of the accuracy of the [Administrative Office] data. [Administrative Office] bankruptcy data in particular have been judged ‘error ridden’ and ‘utterly inadequate for policy purposes.’ Legal scholars working in other fields have defended the [Administrative Office] data as at least serviceable depending on the research question and the subtlety of the statistical techniques used.

Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1652 (2006); see also Miguel F.P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 419 n.127 (2020) (discussing unreliability of Administrative Office “outcome” data).

<sup>119</sup> Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1463 (2003).

<sup>120</sup> See Jennifer Connors Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307, 340-41 (1996) (identifying “carelessness” and transcription errors in Administrative Office data for bankruptcy court statistics and concluding that although “bankruptcy clerk transcription errors do not significantly lower accuracy rates,” “local data entry practices” do exacerbate error rate in “nature of case” data). But see Adam M. Samaha, Michael Heise & Gregory C. Sisk, *Inputs and Outputs on Appeal: An Empirical Study of Briefs, Big Law, and Case Complexity*, 17 J. EMPIRICAL LEGAL STUD. 519, 529-30 (2020) (observing that authors’ “[o]wn experience with [Administrative Office] appellate data has been positive in the main” and that results of audits “were encouraging”).

<sup>121</sup> See *infra* Section II.C (discussing First Circuit merits decisions found on PACER but unavailable on Westlaw, Lexis, or Bloomberg Law).



For Lexis, I requested all content for its circuit-specific “cases” database and then I limited those results using the “timeline” feature in Lexis Advance. I used a timeline of 10/1/20\*\* to 09/30/20\*\*, depending on the twelve-month period at issue. I then recorded the number of hits obtained during that twelve-month period without any additional filtering on the search results.

The process for retrieving database hits from Bloomberg Law was similar, with one important difference. Bloomberg Law’s opinions database has a 1,000-hit limit.<sup>122</sup> Accordingly, for most circuits, I had to break the date-limited search into several months or even one-month time periods (for the Ninth Circuit, in particular) to ensure completeness. Otherwise, the process was functionally the same: I conducted a search (without any keywords) limited only by a date range (10/1/20\*\* to 09/30/20\*\*) for a particular twelve-month period. I then recorded the number of hits that each date-limited search returned.

To gather coverage data for the FDsys database, I conducted an “advanced” date-range search for between 10/1/20\*\* and 09/30/20\*\* in the United States Courts Opinions database for each consecutive twelve-month period. Although I limited that search by circuit, it was necessary to filter by circuit as well, because the database returns hits for both district court and circuit decisions within each circuit search. I recorded the number of hits returned for each appropriately limited search, which was sometimes “o” when the database did not have any data for a particular circuit during a particular twelve-month period.

Finally, a word of caution on reproducing my results: The databases are not static. As Westlaw and Lexis both stated, material may be added to a database at any time.<sup>123</sup> Unsurprisingly, then, rerunning these searches at a later point in time revealed slight discrepancies. On occasion, one or two hits fewer or more would occur over the relevant time period. The data described here are accurate as of September/October 2019, when I asked a research assistant to update the initial results I obtained in June 2019.

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<sup>122</sup> Missing decisions may be findable if armed with certain case information by doing a docket-based search on Bloomberg Law. Bloomberg Law operates two databases for federal appellate court material: an “opinion database” and a “docket database.” E-mail from Tiffany Lozano, *supra* note 32. The former is similar to Westlaw and Lexis’s “cases” databases. The latter is essentially a more usable form of the federal courts’ public electronic records system, known as PACER, and “consists of [a] daily collection of newly filed unsealed cases.” *Id.* Although Bloomberg Law’s docket search system is keyword searchable (unlike PACER), its functionality is limited in so far as researchers generally may not isolate particular types of docket entries (including orders or opinions) for any circuit court, *id.*, resulting in a significant volume of irrelevant search hits. Moreover, the Bloomberg Law docket database frequently requires manual updating—even when decisions were issued several years earlier. For these reasons, Bloomberg Law’s opinions database may be the tool of choice for many researchers, which is why I discuss it (and not the dockets database) here.

<sup>123</sup> E-mail from Sue Moore, *supra* note 106 (relaying information from Amanda Kenny, Product Developer, Thomson Reuters) (describing access to unpublished decisions as “an evolving pool”); E-mail from Vicki K. Pyles, *supra* note 32 (“If we do miss a case, we are always happy to add it to our database.”).

### B. *The Extent of What's Missing*

Let's start with the raw numbers. In the twelve-month period ending September 30, 2017, the twelve geographic courts of appeals self-reported that they issued 34,045 merits decisions.<sup>124</sup> For the same time period, a search of Westlaw, Lexis, and Bloomberg Law's circuit-specific opinions databases returned 24,446, 24,826, and 24,716 total hits, respectively; FDsys returned only 17,297 hits.<sup>125</sup> Buried within that discrepancy are a few notable facts. First, the discrepancy among the commercial databases is, overall, slight. Second, the size of the discrepancy varies by circuit. Table 1, below, includes the raw numbers.

Table 1: Availability of Merits Terminations <sup>126</sup>

	2017 AO Reported Merits	2017 Available FDsys	2017 Available Bloomberg	2017 Available Westlaw	2017 Available Lexis
D.C. Cir.	481	583	906	526	917
1st Cir.	904	491	485	507	493
2d Cir.	2355	253	1562	1657	1570
3d Cir.	2146	1444	1523	1610	1525
4th Cir.	3397	3360	3256	3303	3260
5th Cir.	4608	3228	3488	3603	3499
6th Cir.	3616	1090	1938	1853	1957
7th Cir.	1699	1064	1241	1230	1258
8th Cir.	2472	1216	1814	1304	1824
9th Cir.	7456	727	5074	5219	5093
10th Cir.	1297	1910	1182	1207	1182
11th Cir.	3614	1931	2247	2427	2248
<b>Total</b>	<b>34045</b>	<b>17297</b>	<b>24716</b>	<b>24446</b>	<b>24826</b>

Let me underscore a few points about the limits of these comparisons—limitations that follow from the discussion of the data-collection process above.<sup>127</sup> Although the Administrative Office numbers in Table 1 capture

<sup>124</sup> 2017 JUDICIAL BUSINESS, *supra* note 8, tbl.B-12. Because the Administrative Office does not report data on unpublished decisions from the U.S. Court of Appeals for the Federal Circuit, that circuit's work is not discussed in this Article.

<sup>125</sup> See *supra* Section II.A. (describing data collection procedures).

<sup>126</sup> Data from the "AO" is the Administrative Office of the U.S. Courts, and is available *Caseload Statistics Data Tables*, *supra* note 8. Data from Bloomberg Law, Westlaw, and Lexis describe the number of database hits returned on the searches described above. See *supra* Section II.A. (describing data collection procedures).

<sup>127</sup> See *supra* notes 107–112 and accompanying text (discussing the decision to exclude procedural terminations in comparison).

“merits” or nonprocedural final orders and opinions,<sup>128</sup> the data for the databases capture any individual database entry or hit. Some database hits are duplicate entries.<sup>129</sup> Some are procedural orders that I excluded from my baseline Administrative Office comparison data.<sup>130</sup> For these reasons, the number of database “hits” I retrieved likely includes a nontrivial number of nonmerits decisions or duplicate entries. That means that even the number of available database hits for each circuit represents an overly optimistic proxy for coverage; not every hit returned in a time-limited search will be a “merits” termination within the meaning of the Administrative Office’s data. More is missing than even these numbers convey.

Consider the data from the U.S. Court of Appeals for the D.C. Circuit. It is the only court for which each database search returned *more* hits than the number of merits terminations the court reported it issued during the same twelve-month period. That’s actually the trend we might expect from courts that make more decisions—especially more procedural decisions and more nonfinal decisions—available to the databases. Because the databases generally do not screen for content,<sup>131</sup> courts that make available both procedural terminations and nonfinal orders on free, public-access websites will have greater coverage in commercial databases. In those circumstances, a commercial database that retrieves and archives all content available for free from a court website would return more database hits than the number of merits terminations reported by the Administrative Office in any particular twelve-month period.<sup>132</sup>

For these reasons, I describe my results in terms of the “maximum possible” coverage for each database. That term recognizes that the database hits represent only the maximum *possible* coverage, if we assume that every hit is, in fact, a merits termination as the Administrative Office defines it. Because, in reality, not every hit will be a merits termination within the meaning of the Administrative Office data, “maximum possible” should be understood to capture uncertainty as to the actual content of each database—an inquiry that is beyond the scope of this Article.

Figure 2 shows the maximum possible coverage of each database across all circuits for the twelve-month period ending on September 30, 2017. Although

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<sup>128</sup> See *supra* notes 105–106 and accompanying text (discussing Table B-12 data).

<sup>129</sup> The First Circuit search returned approximately twenty duplicates in data for Lexis and Bloomberg Law during a single twelve-month period; Westlaw had fewer duplicates.

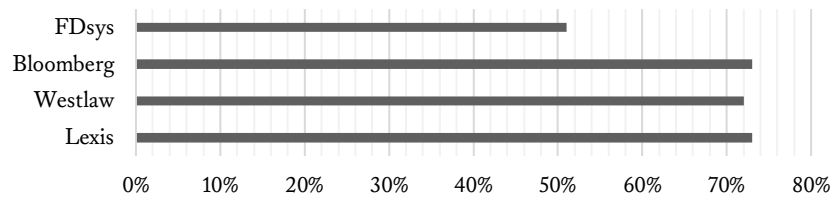
<sup>130</sup> Approximately eleven percent of the commercial database hits in my First Circuit dataset sample were procedural orders.

<sup>131</sup> See *supra* note 106 (discussing the fact that commercial databases generally do not screen for content in federal appellate decision databases, except for purely “housekeeping” orders).

<sup>132</sup> The D.C. Circuit, for example, makes available all “judgments” free of charge on its website, which includes both procedural and merits terminations based on the First Circuit dataset. See *Judgments Archive*, U.S. CT. OF APPEALS FOR THE D.C. CIR., <https://www.cadc.uscourts.gov/internet/judgments.nsf> [<https://perma.cc/L84L-3TX5>]; see also *infra* subsection II.C.2 (discussing First Circuit data on judgments).

these percentages are likely overly optimistic for the reasons just discussed, they are the best we can say about coverage. At most, only approximately seventy percent of court-reported merits terminations from 2017 are available on commercial databases across all circuits; only about fifty percent are available on the public-access database, FDsys.

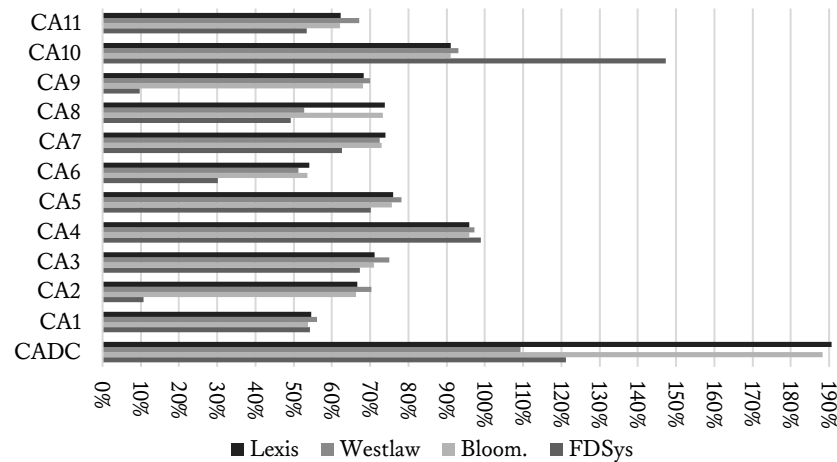
**Figure 2: Maximum Possible Percentage of Available Merits Terminations for Each Database in 2017**



Circuit-specific data identify expected variations in coverage across the circuits.<sup>133</sup> Figure 3 demonstrates that only one circuit—the D.C. Circuit—has decisional coverage on par with what we might expect: *more* database hits than the number of merits terminations reported to the Administrative Office for that year. Coverage for every other circuit in the commercial legal databases is *worse* than the number of merits terminations issued. The Fourth Circuit and the Tenth Circuit have better coverage than their peer circuits in every database. The First Circuit, the Third Circuit, and the Sixth Circuit have the worst; barely more than fifty percent of the merits terminations in these circuits are available in user-friendly databases.

<sup>133</sup> See generally Levy, *supra* note 52 (discussing circuit-level variation and uniformity in case management).

Figure 3: Maximum Possible Percentage of Coverage for Merits Terminations in 2017



Data from the most recent reporting year reflect better coverage. In the twelve-month period ending on September 30, 2018, the geographic circuits reported issuing 31,408 merits decisions.<sup>134</sup> Database hits in Bloomberg Law and Lexis exceeded that number, suggesting a substantial improvement in coverage.<sup>135</sup> Coverage in FDSys remained startlingly low, however: only 13,326 hits, which reflects *less* coverage than FDSys had for the year before. Westlaw had far less coverage than its competitors: a Westlaw search returned only 24,425 hits for the same time period. Table 2 details the numbers by circuit, while Figure 4 reveals the maximum possible coverage for merits terminations across each database. Note that the percentage is greater than one-hundred percent for both Lexis and Bloomberg Law, because the databases contain more hits than reported merits decisions, likely indicating coverage of additional nonmerits or nonfinal decisions.

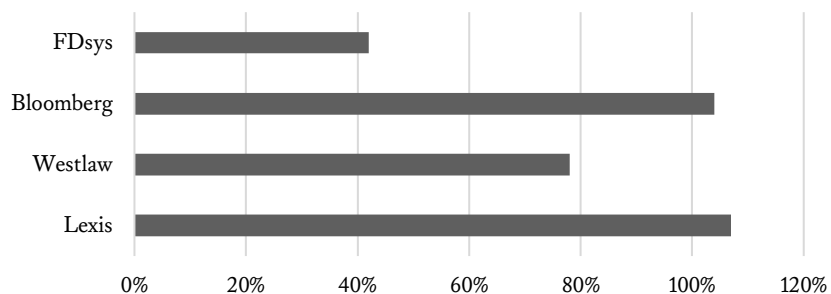
<sup>134</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12.

<sup>135</sup> Bloomberg Law and Lexis data are surprisingly consistent. Lexis frequently provides access to court records for third parties. *See, e.g.,* Myrick v. Equifax Info. Servs., LLC, No. 15-00562, 2017 WL 4798154, at \*2 (Oct. 24, 2017) (describing LexisNexis as “public records vendor” for a consumer credit reporting agency).

Table 2: Coverage Across Platforms and Circuits

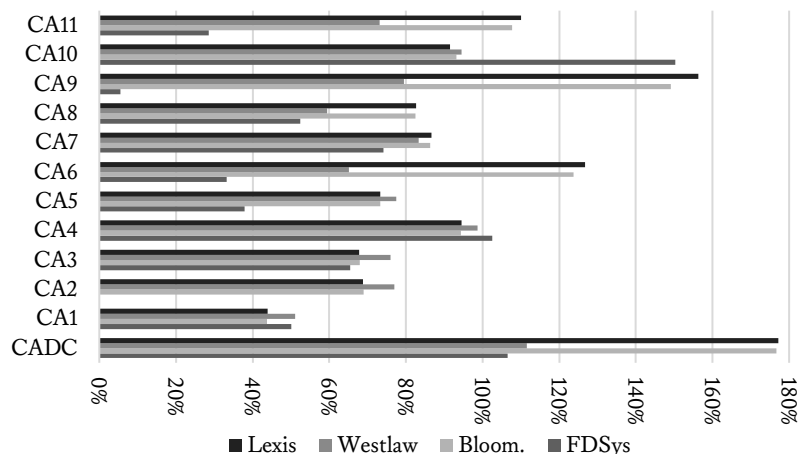
	2018 AO Reported Merits	2018 Available FDsys	2018 Available Bloomberg	2018 Available Westlaw	2018 Available Lexis
D.C. Cir.	553	589	977	617	980
1st Cir.	760	381	333	388	334
2d Cir.	2266	0	1562	1744	1561
3d Cir.	1778	1164	1208	1350	1207
4th Cir.	3049	3124	2879	3011	2882
5th Cir.	4152	1576	3045	3220	3047
6th Cir.	3121	1038	3860	2031	3957
7th Cir.	1412	1047	1218	1177	1223
8th Cir.	2243	1178	1851	1334	1854
9th Cir.	7386	412	11014	5867	11546
10th Cir.	1212	1822	1129	1145	1109
11th Cir.	3476	995	3744	2541	3828
Total	31408	13326	32820	24425	33528

Figure 4: Maximum Possible Percentage of Available Merits Terminations for Each Database in 2017



The aggregate court-wide data obscure the persistence of inter-circuit discrepancies in coverage. Figure 5 reveals that improvements in coverage for several of the busiest courts (the Sixth Circuit, the Ninth Circuit, and the Eleventh Circuit) accounted for improved aggregate coverage in 2018. Other circuits—including the First Circuit—continued to have low coverage.

Figure 5: Maximum Possible Percentage of Coverage for Merits Terminations in 2018



The developments in 2018 suggest that not all databases are created equal; Westlaw's coverage is lower than its competitors, a finding consistent with prior work on coverage issues.<sup>136</sup> And FDSys continues to have anemic coverage for almost every circuit. Not all circuits are created equal, either. Discrepancies vary widely by circuit. Some courts make far more of their output available for use in commercial databases; others significantly under-provide decisions to commercial databases. And nearly all circuits cheat FDSys—the only aggregate, free, and government-run database—of federal appellate decisions. The cause of these disparities is beyond the scope of the work I undertake here. But some of the discussion in Section II.C may shed light on the source of these disparities—namely, what the courts make available for free on their websites.

Appendix A contains similar figures dating back to the twelve-month period ending on September 30, 2008. It contains two charts for every year. The first figure displays database-wide maximum possible coverage for all federal appellate merits terminations during each twelve-month period (like Figures 2 and 4 here), and the second shows the per-circuit maximum possible coverage for each twelve-month period (like Figures 3 and 5 here). The story is largely the same: year over year, coverage for some circuits is lower than we might expect, while coverage for others is more robust. The D.C. Circuit has

<sup>136</sup> Kagan et al., *supra* note 17, at 696-99 (demonstrating disparity in access to immigration appeals between Lexis and Westlaw).

the greatest coverage, by far; the Fourth Circuit and the Tenth Circuit are the next best; the First Circuit and the Sixth Circuit are, overall, the worst.

The historical data reveal an additional anomaly: coverage was generally better a decade ago than it has been in recent times—at least in 2016 and 2017. For the twelve-month period ending on September 30, 2008, for example, maximum possible coverage of merits terminations was at or near ninety percent across the three commercial databases.<sup>137</sup> (It was still less than fifty percent in the FDsys.<sup>138</sup>) Although those aggregate numbers are driven, at least in part, by significant overages for the D.C. Circuit, eight of the remaining eleven geographic circuits had greater than eighty percent coverage that year.<sup>139</sup> Contrast that with the coverage less than a decade later: in the twelve-month period ending on September 30, 2017, coverage dropped below eighty percent in all but three circuits (the D.C. Circuit, the Fourth Circuit, and the Tenth Circuit).<sup>140</sup>

### C. *Observations About Missing Decisions*

By now, I have established that significant coverage gaps exist for most circuits across the last decade. What we don't know—and what is much harder to determine—is what content is missing from the databases. We can glean some insights from a closer examination of the First Circuit's coverage, but, before discussing those results, this section will make a few initial observations about what categories of appeals may or may not be missing from the databases.

#### 1. The Likely Suspects

Many of us likely assume that what's missing has little, if any, content, and, relatedly, has little value. Kagan, Gill, and Marouf already have disproved that assumption by showing that significant gaps in substantive immigration appellate decisions exist.<sup>141</sup> One might assume that my data only confirm theirs. But the discrepancies are substantial enough that known gaps in immigration appeals coverage cannot account for the results.

Although Administrative Office statistics are not sufficiently granular to determine the volume of immigration appeals resolved during any twelve-month period, we know that in the twelve-month period ending on September 30, 2017, for example, the courts of appeals only resolved 2,661 administrative appeals on the merits.<sup>142</sup> Administrative appeals include, but

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<sup>137</sup> Appendix A, Figure 9.1.

<sup>138</sup> Appendix A, Figure 9.1.

<sup>139</sup> Appendix A, Figure 9.2.

<sup>140</sup> *Supra* Figure 2.

<sup>141</sup> Kagan et al., *supra* note 17, at 698-99 (describing gaps in immigration coverage between 2009 and 2012).

<sup>142</sup> 2017 JUDICIAL BUSINESS, *supra* note 8, tbl.B-5.



are not limited to, immigration appeals. So, known gaps in immigration appeals cannot possibly account for the 10,000-decision shortfall in 2017 (see Table 1). Further, there's no reason to believe that 2017 was an outlier, given the relatively persistent pattern of discrepancies.

Other presumptively valueless missing decisions remain: one-word orders affirming the decision below without reasoning and similarly perfunctory orders in original proceedings and miscellaneous applications. Although both kinds of decisions may have value as part of the procedural or decisional history of a case, these cases may have less value as reasoned or useful precedent.

None of these categories of unreasoned decisions can, on their own, make up the shortfalls in the data (though they could account for the totality of what's missing in any particular circuit). The courts of appeals self-report that they issue relatively few purely unreasoned or "without comment" merits decisions. Indeed, in 2018 the courts collectively, issued only 1,373 "[u]nsigned, [w]ithout [c]omment" decisions.<sup>143</sup> Moreover, the vast majority of those—or 1,192 of the 1,373—came from one circuit: the Eighth Circuit.<sup>144</sup> The year before, when the shortfall was much greater, the courts still only issued 2,803 unreasoned or "[u]nsigned, [w]ithout [c]omment" decisions.<sup>145</sup> That relatively small volume of decisions—only 8.2% of all merits decisions—cannot account for the gaps in coverage (either on its own or in combination with the known gaps for immigration appeals).

What that also means is that a significant percentage of the missing decisions are decisions that, at least according to the Administrative Office, "expound the law as applied to the facts of the case and detail the judicial reasons upon which the judgment is based."<sup>146</sup> That's assuming that courts accurately disclose the percentage of decisions that meet the Administrative Office's reasoned-elaboration threshold—a potentially dubious proposition.<sup>147</sup> What we can say here is that, at least according to the courts themselves, most of their output does meet some minimal reason-giving threshold; the courts, therefore, have no cause to withhold decisions from free and publicly accessible court websites for content reasons (or at least not at the levels seen in the data).

One caveat: some circuits have relied more heavily on "without comment" decisions at earlier points in time. Table 3, below, shows the percentage of "without comment" decisions as a fraction of all merits decisions issued by each circuit between 2008 and 2017. Notably, the Ninth Circuit relied heavily

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<sup>143</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12.

<sup>144</sup> *Id.*

<sup>145</sup> 2017 JUDICIAL BUSINESS, *supra* note 8, tbl.B-12.

<sup>146</sup> *Id.* n.1.

<sup>147</sup> See McAlister, *supra* note 43, at 576-82 (discussing poor decisional quality of opinions classified as reasoned by appellate courts).

on this practice between 2012 and 2015, which could account for coverage gaps in that circuit during that time period. But coverage problems persist for the Ninth Circuit, despite issuing more reasoned decisions in later years; in 2017, coverage in commercial databases was near seventy percent, and less than sixteen percent of the court's merits decisions were unreasoned.

Table 3: Percentage of Unreasoned Merits Terminations<sup>148</sup>

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
D.C. Cir.	0.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.2%	0.0%	0.0%
1st Cir.	0.1%	0.2%	0.1%	0.2%	0.4%	1.1%	1.4%	1.3%	1.2%	2.4%
2d Cir.	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
3d Cir.	2.4%	4.9%	5.7%	5.2%	4.6%	4.6%	5.2%	5.4%	5.5%	3.1%
4th Cir.	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
5th Cir.	0.6%	0.6%	0.3%	0.5%	0.6%	0.5%	0.5%	0.1%	0.1%	0.2%
6th Cir.	1.2%	0.1%	0.1%	0.3%	0.2%	0.1%	0.1%	0.1%	0.1%	0.1%
7th Cir.	3.5%	2.1%	2.0%	1.4%	1.5%	0.4%	0.6%	0.1%	0.0%	0.3%
8th Cir.	31.2%	38.0%	33.5%	37.0%	48.6%	52.0%	51.6%	52.9%	54.7%	57.5%
9th Cir.	0.1%	0.3%	8.1%	19.6%	46.6%	45.5%	45.8%	40.4%	19.0%	15.7%
10th Cir.	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
11th Cir.	6.4%	5.8%	6.6%	6.1%	2.6%	3.1%	3.3%	3.0%	1.9%	1.9%

Finally, standing on their own, decisions in “original proceedings” also cannot account for the shortfalls across all circuits. The Administrative Office data on unpublished decisions include merits terminations for this category of appellate proceedings; for the twelve-month period ending on September 30, 2017, for example, the courts resolved approximately 6,000 “original proceedings” on the “merits.”<sup>149</sup> That sizable number still cannot account for all missing termination decisions during the same time period (approximately 10,000). It’s possible that this category of merits terminations, combined with immigration appeals and “without comment” decisions, are the sum total of what’s missing. But these are sometimes overlapping—and not necessarily mutually exclusive—categories, as some unreasoned decisions likely include immigration appeals and certainly include “original proceedings.” Data from the First Circuit example, moreover, suggest that the story is more complicated than missing only “original proceedings.” Although many merits

<sup>148</sup> Data reported here derive from comparing the number of “without comment” decisions (whether published or not) against the total number of postconsolidation merits decisions issued in each circuit every year, as reported in Table B-12 of the Administrative Office’s annual Judicial Business publication. See, e.g., 2017 JUDICIAL BUSINESS, *supra* note 8, tbl.B-5.

<sup>149</sup> *Id.*

terminations in original proceedings likely are missing from commercial databases, not all are, and nationally more decisions are missing than this category of appellate proceedings alone contains.

The bottom line: at least a nontrivial portion of what is missing from commercial databases are the very decisions we expect the commercial databases to have: reasoned, unpublished decisions resolving appeals as of right from district courts and administrative agencies. The First Circuit example discussed in the next section confirms this insight.

## 2. The First Circuit Example

Because the volume of what's missing is so significant, it is beyond the scope of this work to offer a comprehensive account of how the decisions have gone missing, what they look like, and what value they may have. But I can begin to answer those important questions by examining the missing decisions in one circuit: the First Circuit. The First Circuit is a particularly good example of the missing decisions phenomenon because the court has both persistent gaps in coverage and a relatively low volume of appellate activity, making it a manageable circuit to examine. In other ways, however, I should note that the First Circuit is an outlier. It has one of the highest publication rates across the circuits (second only to the D.C. Circuit in 2017 and 2018).<sup>150</sup>

Despite that low unpublication rate, the First Circuit has one of the most significant gaps in database coverage for unpublished decisions. In Table 4, below, I compare the number of unpublished merits terminations the First Circuit has reported each year to the number of unpublished decisions available for the same corresponding time on Westlaw and Lexis.<sup>151</sup> Put in terms of relative percentage of maximum possible coverage for unpublished merits terminations, coverage ranges from thirty percent to barely more than six percent over the last decade, as Table 5 demonstrates.

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<sup>150</sup> 2018 JUDICIAL BUSINESS, *supra* note 21, tbl.B-12; 2017 JUDICIAL BUSINESS, *supra* note 8, tbl.B-12.

<sup>151</sup> Bloomberg Law and FDsys do not permit filtering by publication status, so these charts do not include that data.

Table 4: Number of Unpublished First Circuit Decisions Available on Commercial Databases

	AO	Westlaw	Lexis
2018	474	116	62
2017	553	169	157
2016	604	55	56
2015	551	52	56
2014	545	38	44
2013	601	54	68
2012	611	47	63
2011	510	39	51
2010	627	39	50
2009	647	74	97
2008	592	82	97

Table 5: Percentage of Unpublished First Circuit Decisions Available on Commercial Databases

	Westlaw	Lexis
2018	24.5%	13.1%
2017	30.6%	28.4%
2016	9.1%	9.3%
2015	9.4%	10.2%
2014	7.0%	8.1%
2013	9.0%	11.3%
2012	7.7%	10.3%
2011	7.6%	10.0%
2010	6.2%	8.0%
2009	11.4%	15.0%
2008	13.9%	16.4%

How does this happen? The First Circuit triages its appellate decisions, explaining that due to the “volume of filings” it “cannot dispose of each case by opinion.”<sup>152</sup> “Opinion,” its Local Rules suggest, is a term of art—perhaps used to be consistent with the E-Government Act of 2002.<sup>153</sup> The First Circuit issues three types of decisions in appeals: “order, memorandum and

<sup>152</sup> 1ST CIR. R. 36.0(a).

<sup>153</sup> See Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified at 44 U.S.C. § 3501 note).

order, or opinion.”<sup>154</sup> “[S]ome opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not published in West’s Federal Reporter.”<sup>155</sup> Although it is the court’s policy to “prefer” that “opinions . . . be published,” sometimes they are issued in unpublished form.<sup>156</sup> Ultimately, these unpublished “opinions” are what the commercial databases find, because “opinions”—whether published or not—are the decisions that the court posts to its website and makes freely available to the public. All types of “unpublished” adjudications in the First Circuit—including opinions, memoranda, and orders—may be cited for their persuasive value.<sup>157</sup> But only “opinions” are easy and free to find.

The First Circuit’s website also exposes the problem—if you look carefully. Its “opinion search” feature contains only a fraction of the merits decisions the court issues each year—that is, only the cases that it has formally resolved with an “opinion.”<sup>158</sup> The rest of its adjudications—those resolved with orders or memoranda—are hidden behind a PACER paywall under the label “judgments.” Some of these judgments are extensive, with several pages of reasoned explanation.<sup>159</sup> Others are perfunctory.<sup>160</sup>

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<sup>154</sup> 1ST CIR. R. 36.0(a).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 32.1.0(a) (“An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent.”).

<sup>158</sup> U.S. Court of Appeals for the First Circuit Opinions, U.S. CT. OF APPEALS FOR THE FIRST CIR., <http://media.ca1.uscourts.gov/opinions/> (enter desired search parameters).

<sup>159</sup> See, e.g., *Bogosian v. Hall*, No. 15–1681 (1st Cir. Jan. 4, 2017); *Stalcup v. Naval Special Warfare Command*, No. 15–2107 (1st Cir. Feb. 8, 2017); *United States v. Suarez-Rodriguez*, No. 15–2511 (1st Cir. Feb. 3, 2017).

<sup>160</sup> See, e.g., *Sloan v. Hearst Media Co.*, No. 16–1885, slip op. at 1 (1st Cir. Oct. 28, 2016) (“After careful de novo review of the record and the parties’ submissions, we affirm the dismissal of the complaint, substantially for the reasons adopted by the district court.”); *In re Lewis*, Nos. 16–1054 & 16–1398, slip op. at 1 (1st Cir. Nov. 14, 2016) (similar); *Reedom v. Colvin*, No. 16–1531, slip op. at 1 (1st Cir. May 8, 2017) (similar).

First, let's find these judgments. "Judgments" are available only by logging into the PACER system on the First Circuit's website. When you do, this screen appears:

Figure 6

At the top of the screen, it is easy to spot the distinction the First Circuit draws: "opinions" are separated from "orders/judgments." Clicking on the "orders/judgments" link takes you to this screen:

Figure 7

From here, you can isolate orders, judgments, opinions, dispositive entries only, and per curiam (or unsigned) entries only. Not every dispositive entry has an "opinion," and only opinions are available through the main circuit webpage. Neither the "opinion" search feature, nor the judgment search feature are keyword searchable, but both may be searched using a date

limitation (or by case number). Note that the judgments search page makes clear that each search will incur PACER fees—fees that may exceed the “30 page limit on PACER charges.” Each search, therefore, may cost more than \$3.00 (at 10 cents per page) if the search returns more than 30 pages.<sup>161</sup> Further, retrieval of each judgment incurs an additional 10 cent per-page fee, as the Download Confirmation screen here warns me before asking whether to proceed to recover this particular judgment:

Figure 8

**Download Confirmation**

Document: PDF Document (Case: 15-2137, Document: 00117072573)

Click on the “Accept Charges and Retrieve” button ONCE at the bottom of this page to download the document image.  
If you download this document, your PACER account will be billed according to the table below:

<b>PACER Service Center</b>			
Transaction Receipt			
10/03/2019 17:18:11			
<b>PACER Login:</b>	mmcalisterUFL	<b>Client Code:</b>	
<b>Description:</b>	PDF Document	<b>Search Criteria:</b>	Case: 15-2137, Document: 00117072573
<b>Billable Pages:</b>	2	<b>Cost:</b>	0.20

☒ Show PDF Header

After reviewing the website, I hypothesized that “judgments” without “opinions” were largely what was missing from the First Circuit data on Westlaw, Lexis, and Bloomberg Law. Because the databases each report that they depend on court websites and other public-source material for their data, if judgments issued without separate opinions are hidden behind paywalls, then they may be retrieved infrequently (if at all).





To test this hypothesis, a research assistant and I ran searches for twelve months’ worth of judgments corresponding with the Administrative Office reporting year ending on September 30, 2017. We exported each month’s worth of data into an Excel spreadsheet. Because these judgments often have significant docket text, as the next screen shot demonstrates, we were able to code the decisions from the docket sheet alone as “merits,” “procedural,” or

<sup>161</sup> I incurred approximately \$81.60 in PACER fees to retrieve the First Circuit dataset and related data used in this Article. See E-mail from Do\_Not\_Reply@psc.uscourts.gov to author (Oct. 12, 2019 4:17 AM) (on file with author) (indicating a quarterly balance due of \$81.60). Once I obtained a complete list of judgments during the relevant time period from PACER, I used Bloomberg Law’s docket-based search to retrieve each individual missing decision; I almost always had to “update” the docket on Bloomberg Law and/or request the judgment (a feature that is free to users, like me, with an academic account).

“disciplinary” and identify the outcome of the proceeding (“affirmed,” “vacated,” “reversed,” “granted,” “denied,” “dismissed,” etc.).

Figure 9

**First Circuit Court of Appeals  
Orders/Judgments and Opinions**

Case Number	PDF	Filed Date	Entry Date	Type	Description
<a href="#">16-1735</a> <a href="#">US v. Wharf</a>		10/03/2016	10/03/2016 10:56:00	Judgment	JUDGMENT dismissing case pursuant to Fed. R. App. P. 42(b). 16-1735 42b [16-1735]
<a href="#">15-1863</a> <a href="#">Teague v. Brennan</a>		10/03/2016	10/03/2016 13:48:12	Judgment	JUDGMENT entered by Rogerie Thompson, Appellate Judge; William J. Kayatta, Jr., Appellate Judge and David J. Barron, Appellate Judge: Plaintiff-Appellant Ruth Teague seeks review of the district court's grant of summary judgment to Defendant-Appellee Megan J. Brennan in the underlying action. Having reviewed the record de novo, we conclude that summary judgment in favor of Brennan was proper for substantially the same reasons set forth in the district court's June 25, 2015, Memorandum and Order. See <i>Chadwick v. Wellpoint, Inc.</i> , 561 F.3d 38, 43 (1st Cir. 2009) (setting out standard of review for summary judgment rulings). Accordingly, Brennan's motion for summary disposition is allowed and the judgment of the district court is affirmed. See 1st Cir. L. R. 27.0(c). [15-1863]
<a href="#">16-8018</a> <a href="#">In Re: Mooney</a>		10/03/2016	10/03/2016 14:09:02	Judgment	JUDGMENT entered by Sandra L. Lynch, Appellate Judge; William J. Kayatta, Jr., Appellate Judge and David J. Barron, Appellate Judge. Suspended [16-8018]
<a href="#">16-2090</a> <a href="#">Navedo-Ramirez v. US</a>		10/03/2016	10/03/2016 15:09:34	Judgment	JUDGMENT entered by Sandra L. Lynch, Appellate Judge; William J. Kayatta, Jr., Appellate Judge and David J. Barron, Appellate Judge: Yamil Navedo-Ramirez appeals pro se from the district court's interlocutory order denying her motion for appointment of counsel. We DISMISS the appeal for lack of jurisdiction because orders

Our twelve-month collection of judgments compares favorably with the data the First Circuit reported to the Administrative Office for the same period. Table 6 compares the data we collected through the judgment search to the Administrative Office statistics. The third column indicates the rate of capture. The bottom line: a “judgments” search captures all decisional output from the First Circuit, whether procedural terminations or merits terminations.



Table 6: Terminations Recovered through First Circuit PACER Judgment Search<sup>162</sup>

	Administrative Office Data	Collected Data	Percentage Recovered
Cases/Proceedings Terminated on the Merits	904	871	96.3%
Cases/Proceedings Terminated on Procedural Grounds	507	506	99.8%

But not all “judgments” are available for free on the court website. Only 361 or 39.9% of the judgments we coded as “merits” terminations had a corresponding “opinion” available on the First Circuit website. One hundred percent of those 361 judgments with a corresponding opinion on the court’s public website were also available on Westlaw, Lexis, and Bloomberg Law. Overall, however, only 406 or 44.9% of the judgments we coded as merits decisions were available on each of the three commercial databases. The databases only captured forty-five additional merits terminations—that is, forty-five additional merits decisions that did not appear on the court website—during the relevant twelve-month period.

Coverage for procedural decisions was, as expected, much worse. Less than four percent of reported procedural terminations appeared on the court website as opinions (all of which also appeared in the commercial databases). About forty-one additional procedural terminations were findable on the commercial databases—roughly the same number of additional findable merits terminations (forty-five, as discussed above). Table 7 breaks down the data.

Table 7: Availability of First Circuit Merits and Procedural Terminations in Databases and on Court Website

	Issued per Administrative Office	Available on Commercial Databases	Available on Court Website
Merits Terminations	904	406 (44.9%)	361 (39.9%)
Procedural Terminations	507	58 (11.4%)	17 (3.4%)

<sup>162</sup> The Administrative Office statistics can be found on Tables B-5 (merits) and B-5A (procedural). 2017 JUDICIAL BUSINESS, *supra* note 8, tbl.B-5A (2017); *id.* tbl.B-5.

Recall that “merits terminations” and “procedural terminations” within the meaning of the Administrative Office statistics include more than decisions in traditional appeals as of right; the Administrative Office also includes decisions in original proceedings and miscellaneous applications within these termination numbers. We isolated appeals as of right from original proceedings in our dataset based on the type of outcome (affirmed/vacated/remanded/reversed versus granted/denied). Of the 871 merits judgments collected (*see* Table 6), 625 (or 72%) involved appeals resulting in an affirmance, vacatur, reversal, or enforcement of a district court decision or administrative order.

Two hundred eighty-four of the 625 merits terminations in appeals as of right in the dataset never made it to the First Circuit’s website; the clear majority of those 284 decisions—253 of the 284 or 89%—were also missing from each of the commercial databases. Eleven decisions could be found on one or more databases but were not available on all three. Table 8 examines the coverage for appeals as of right from a district court or administrative agency resolved on the merits. Only slightly more than half of those appeals resulted in decisions posted on the court website, and slightly less than sixty percent of merits appeals were findable using commercial databases.

Table 8: Availability of First Circuit Merits Terminations in Appeals as of Right

	Available in Dataset	Available on Court Website	Missing from Court Website	Missing from All Three Databases
<b>Merits Terminations in Appeals as of Right</b>	625 (72% of all merits terminations retrieved)	341 (54.6% of all merits terminations in appeals as of right)	284 (45.4% of all merits terminations in appeals as of right)	253 (40.5% of all merits terminations in appeals as of right)

To understand the impact of what’s missing, we pulled copies of every judgment missing from all three commercial databases off of Bloomberg Law’s dockets database (which is equivalent to PACER but more user-friendly and free for academics).<sup>163</sup> Of the missing decisions, the majority—but not *all*—affirmed the judgment below. Some—like the result discussed in Mr. Jones’s case in the introduction<sup>164</sup>—involved favorable results for the appellant. The missing decisions dataset contained no outright reversals,

<sup>163</sup> See *supra* note 122 (describing Bloomberg Law’s available databases).

<sup>164</sup> See *supra* notes 1–6 and accompanying text (discussing the *Jones* case).

however. Table 9 indicates the outcome in the missing decisions. As might be expected, approximately ninety percent were affirmances.

Table 9

Number of Affirmances/Enforcement	Number of Vacaturs	Number of Remands	Number of Reversals
228	13	12	0
90.1%	5.1%	4.7%	0.0%

The missing decisions are largely reasoned—meaning that they usually cite to legal authority to support the result and almost always give some explanation for the result. That is to say, there are no one-word affirmances among the missing decisions dataset.<sup>165</sup> Table 10 shows the mean and median word count for the missing decisions, as well as the range in length of the missing decisions; some say quite a lot and some, as we might expect, say little. Table 11 demonstrates that the majority of the decisions cite to at least some case law authority to support the result, but 51 of the 253 decisions (or approximately 20%) do not cite to any case law. There were also twenty-eight decisions in which the court noted that criminal defense counsel had filed a brief under *Anders v. California*.<sup>166</sup> Excluding the *Anders* appeals and those decisions that cite no law, at least seventy percent of the missing decisions arguably have some value as precedent insofar as they explain and apply the law to a set of identified (and potentially unique) facts. The rest may still have some value as an indication that the appellate court approved the result below or found no error on appeal.

<sup>165</sup> Not all of the decisions provide satisfying reasons, however; decisions that do no more than affirm for the reasons given by the district court may be inadequate to resolve an appeal. See McAlister, *supra* note 43, at 577-82 (arguing that courts should not use reasoning-through-incorporation where appellant has challenged the district court's reasoning or otherwise responded to district court decision on appeal). A handful of the decisions in the dataset offered reasoning only by way of reference to a district court decision. See *supra* note 160 (identifying decisions that explain outcome based on district court's reasoning).

<sup>166</sup> 386 U.S. 738 (1967) (holding that a defense attorney can seek withdrawal from representation if no nonfrivolous grounds for appeal exist provided that they conduct a full examination of the proceedings before concluding that no grounds exist).

Table 10: Word Count Data for Missing Decisions in First Circuit Dataset

Mean Word Length of Judgement	Median Word Length of Judgment	Highest Word Count	Lowest Word Count	Number of Judgments with more than 500 words	Number of Judgments with between 250 and 500 words
249	140	1950	24	30	49

Table 11: Citation Information for Missing Decisions in First Circuit Dataset

Mean Number of Citations to Caselaw	Median Number of Citations to Caselaw	Number of Decisions Without Caselaw	Number of <i>Anders</i> Citations
2.5	1	51	28

The missing decisions were significantly more likely to involve pro se appellants than was true for pro se terminations more generally in the First Circuit during the same time period. For the twelve month period ending on September 30, 2017, 467 of the 1,472 case terminations (including both merits and procedural terminations) involved pro se litigants (or 31.7%).<sup>167</sup> The First Circuit had the lowest volume of pro se litigation across the circuits.<sup>168</sup> In the dataset of missing decisions, however, nearly half or 49.4% of terminations involved pro se appellants. It was more than twice as likely that a missing judgment involved a criminal appeal (67.1%) than was true for all merits terminations in the First Circuit during the same time period (31.6% of merits terminations were criminal).<sup>169</sup> Table 12 describes the frequency of various categories of appeals within our dataset of “missing” merits decisions in appeals as of right.

<sup>167</sup> 2017 JUDICIAL BUSINESS, *supra* note 8, tbl.B-9.

<sup>168</sup> McAlister, *supra* note 43, at 555-59, fig.10 (discussing pro se appellate litigation across all circuits and comparing the First Circuit’s relatively low 35.4% rate of appeals commenced by pro se plaintiffs).

<sup>169</sup> 2017 JUDICIAL BUSINESS, *supra* note 8, tbl.B-5.

Table 12: Types of Appeals in First Circuit Missing Decisions Dataset (n=253)

Types	Number
Number of Pro Se Appellants	125 (49.4% of all missing)
Criminal Appeals (including Motions to Vacate Sentence)	170 (67.1% of all missing)
Number of Civil Rights Appeals (including Employment)	30
Number of Prisoner Appeals (including Habeas)	16
Number of Foreclosure Appeals	5
Immigration Appeals	4
Number of Bankruptcy Appeals	4
Number of Social Security and Medicare Appeals	2

Although some of the absolute numbers of these categories are not particularly significant, together they account for 231 of the 253 missing judgments, or 91.3%. Unfortunately, Administrative Office statistics are not sufficiently granular to help us assess what overall percentage of terminations in the First Circuit involve these categories of cases. Suffice it to say, however, that only a handful (if any) of these missing decisions involve the kinds of complex civil disputes that others have observed frequently receive the most attention from the federal appellate courts.<sup>170</sup> And none appeared to involve cases that had proceeded to oral argument only to end in a missing decision; these were all appeals that involved the minimum amount of appellate process (briefing and decision).

Finally, to the extent that word count may be a meaningful proxy for substance, it appears that the missing decisions from these categories of cases—the categories identified in Table 12—are likely to be substantive. Table 13 identifies the mean word count of missing decisions by nature of suit. What's striking is that even though the absolute numbers of missing decisions in some categories are small (for example, for prisoner appeals and Social Security/Medicare appeals), the mean word count suggests, again, that the missing decisions themselves may have some value as reasoned precedent.

<sup>170</sup> See Richman & Reynolds, *supra* note 29, at 275-76 (describing the two-track system of federal appellate process); see also Vladeck & Gulati, *supra* note 87, at 1668 & n.3 (2005) (same); Pether, *supra* note 29, at 144, 1460-61 (criticizing less rigorous tracks of appellate decisionmaking).

Table 13: Word Count by Nature of Suit in First Circuit Missing Decisions Dataset

Nature	Average Word Count
Criminal (excluding <i>Anders</i> ) (n=142)	255.9
Civil Rights (including Employment) (n=30)	301.2
Prisoner Appeals (including Habeas) (n=16)	417.8
Foreclosure Appeals (n=5)	137.8
Immigration Appeals (n=4)	66.3
Bankruptcy Appeals (n=4)	63.3
Social Security and Medicare Appeals (n=2)	516.5

The First Circuit's missing decisions may be exceptional; more work should be done on missing decisions before we can extrapolate with confidence based on the First Circuit example. But if the First Circuit is representative of the problem, then we can no longer afford to ignore what's missing.

### III. WHY CARE?

Because the missing decisions involve unpublished decisions—decisions that make no law and supposedly involve only routine issues<sup>171</sup>—some may be less concerned that these decisions are “missing” from commercial databases. Indeed, some may conclude the courts have curated the most helpful precedent, thereby protecting us from information overload.

This Part makes the case for why we should care about missing decisions. I will offer two reasons: access to precedent and access to systemic information about the courts themselves. First, in a post–Rule 32.1 world where all unpublished decisions are citable and have persuasive value,<sup>172</sup> the submergence of any useful circuit-level precedent is inexcusable. If the courts are worried about information overload, that's why search algorithms exist. More problematic, in my view, is the risk that the submergence of certain kinds of cases—civil rights and criminal appeals involving constitutional duties, in particular—may have a distortion effect on the law. At least some of what's

<sup>171</sup> As one jurist explained,

Today, courts use unpublished opinions to issue quick, reasoned decisions in routine cases based on settled precedent. For example, thousands of petitions to review deportations and denials of Social Security benefits turn on discrete facts determined by administrative law judges; hearing oral arguments and issuing published opinions in most would only delay decisions that should be speedy.

William H. Pryor, Jr., Opinion, *Conservatives Should Oppose Expanding the Federal Courts*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/conservatives-expanding-federal-courts.html> [<https://perma.cc/P3LW-PHY3>].

<sup>172</sup> FED. R. APP. P. 32.1.

missing reflects settled law that—if not for its relative invisibility—otherwise might shape the rights of citizens and duties of state actors.<sup>173</sup>

Second, even if missing decisions offer little precedential value, the missing decisions nevertheless contain and constitute essential information about the federal appellate court system itself. Our inability to navigate what's missing thwarts any effort to assess the size, scope, and attributes of the second (or third?) tier of federal appellate justice to which the courts appear to shunt certain classes of litigants (*pro se*) and certain types of cases (criminal) more often than others.

These are not the only reasons why the missing decisions matter; there are other reasons why we should care, which I will only touch upon briefly.<sup>174</sup> Limiting easy and useful access to any appellate level decision will have distortion effects for both empiricists and practitioners—separate and apart from the more normative concerns I address in this Part. This work reveals significant sampling bias risks for empirical work at the circuit-level using commercial databases—biases that researchers have acknowledged at the district court level<sup>175</sup> but may not have appreciated at the circuit level.<sup>176</sup> For practitioners, there are distortion effects as well. Appellate decisions not included in commercial databases skew the procedural history information of the district court decisions otherwise included in those databases. Precisely for this reason, Lexis explained that it does not screen one-word affirmances from its database: “[A] one-word affirmance would be highly valuable as part

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<sup>173</sup> See Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 119 (2019) (“Modern civil rights litigation rests on the premise that law indeed becomes settled . . . Citizens may rely on the eminently reasonable assumption that officials will abide by settled law, and they may seek compensation when officials fail to do so.”).

<sup>174</sup> Some might also argue, persuasively, that missing decisions reflect a pedestrian example of the problems with “secret law” that James J. Brudney, Deborah Jones Merritt, and Dakota S. Rudesill have discussed. See Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT’L. SEC. J. 241, 308 n.233 (2015) (noting some less troubling forms of secret law, including private or confidential legal documents); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 117 (2001) (arguing that limited publication of judicial decisions inhibits the ability of parties to track variations in the application of legal rules to fact sets).

<sup>175</sup> See, e.g., David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1214 (2013) (discussing incompleteness in Westlaw and Lexis’ databases for empirical work on district court decisions); Hoffman et al., *supra* note 14, at 686 (same); see also McCuskey, *supra* note 16, at 522 (“It is well-documented that district-court opinions selected for the print reporter volumes (the Federal Supplement and Federal Rules Decisions) may not be representative of decision-making, and that therefore reliance solely on reported decisions to study judicial behavior risks biased results.”).

<sup>176</sup> See, e.g., Anderson et al., *supra* note 19, at 1182–83, 1183 n.97 (relying on Westlaw to conduct empirical work on recusals by federal circuit judges and noting that a Westlaw representative “do[es] not believe there are any U.S. Court of Appeals decisions that are not on Westlaw in some format”); see also *supra* note 20 (collecting statements assuming breadth of Westlaw and Lexis coverage for unpublished decisions).

of the overall case history in Shepard's."<sup>177</sup> Missing federal appellate decisions thus may lead to inaccurate Shepard's reports for district court decisions that are otherwise available in commercial databases.

### A. *Meaningful Access to Precedent*

Some of what's missing has value as precedent. That is true, generally, of unpublished decisions, which scholars have recognized are capable of making "important contributions to common law" and sometimes vary little "in complexity or importance" from their published counterparts.<sup>178</sup> By now, there's widespread agreement that unpublished adjudications are worthy of scholarly attention and that courts use unpublished adjudications in meaningful—and sometimes deleterious—ways.<sup>179</sup> Unpublished decisions are not decisions we should ignore.

We have also abandoned the unsophisticated view of "precedent" that adhered to the early use of unpublished decisions. Precedent is not an "all-or-nothing proposition."<sup>180</sup> Thanks to Rule 32.1 (and the overwhelming scholarly criticism that paved its way), we are now free, according to one scholar, "to draw compelling analogies to nonbinding precedents," even when courts label those precedents "unpublished" or "non-precedential."<sup>181</sup>

From this perspective—the perspective of those who defeated no-citation bans and challenged their narrow conception of precedent—the discovery of missing decisions raises the specter of a foe believed to have already been vanquished. Navigable access to federal appellate decisions was a problem that was thought to be solved long ago—and long before Rule 32.1 ensured

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<sup>177</sup> E-mail from Vicki K. Pyles, *supra* note 32.

<sup>178</sup> Denise M. Keele, Robert W. Malsheimer, Donald W. Floyed & Lianjun Zhang, *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 218 (2009).

<sup>179</sup> See, e.g., Pether, *supra* note 29, at 1436 n.4 (examining effects of unpublication scheme on litigants' ability to manipulate precedent); Richman & Reynolds, *supra* note 29, at 275-76 (examining deleterious effects of unpublication scheme on the behavior of judges, clerks, and litigants); Keele et al., *supra* note 178, at 213 (recognizing that empiricists should take unpublished adjudications into account because the "process of judicial decision making in the courts of appeals differs between published and unpublished opinions" and cautioning scholars from "drawing conclusions from examinations of published opinions alone").

<sup>180</sup> See Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1236 (2004) ("[The] conception of precedent reflected in the no-citation rules appears incomplete or distorted."); see also Pether, *supra* note 29, at 1520 ("[Dissenting judges] conceived of precedent broadly: 'Each ruling, published or unpublished, involves the facts of a particular case and the application of law—to the case. Therefore, all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citations.'" (quoting Rules of Tenth Circuit, 955 F.2d 36, 37 (10th Cir. 1992) (Holloway, C.J., concurring and dissenting))).

<sup>181</sup> Pearson, *supra* note 180, at 1236-37 (describing scholarly commentary on the practice of "non-precedential precedent" in the federal appellate courts as "overwhelmingly negative").



that unpublished decisions could be used. Missing decisions are useful only to the parties who know of their existence already, because the decisions are unfindable using traditional legal research tools.

Although the courts lifted no-citation bans more than a decade ago, in some circuits those citation bans remain, functionally speaking, if reams of decisions never make their way to user-friendly commercial databases. A decision like *Jones v. Gelb*,<sup>182</sup> which began this Article, cannot be used if it is not found or findable using traditional tools—unless, by chance, someone is already aware of its existence. Some unpublished decisions, then, actually are *unpublished*. Neither a law clerk nor a lawyer looking for cases involving “pepper spray” in the First Circuit would ever find *Jones v. Gelb*.

Even so, are these missing decisions really worth finding? Are they useful as “precedent,” however loosely defined? Take a look at the relevant portion from *Jones v. Gelb*,<sup>183</sup> the decision highlighted in the first paragraph of this Article.<sup>184</sup> The decision has more than 1,000 words, and, as to the portion of the district court’s summary judgment decision that it vacated, the court explained:

After a thorough review of the record and of the parties’ submissions, we affirm in part, vacate in part, and remand for further proceedings.

Preliminarily, we note that we have reviewed the video of the August 2009 incident, but the video is of poor quality, and the interactions between the plaintiff/appellant, Antonio Jones (“Jones”), and the officers present are not always in full view; thus, the video is of limited usefulness at this stage. We must review the rest of the record in the light most favorable to Jones and indulge all reasonable inferences in his favor.

We conclude that the district court erred in granting summary judgment in favor of defendant/appellee Steven R. Legere (“Legere”) on Jones’ claim that the use of pepper spray during the August 2009 incident infringed the plaintiff’s Eighth Amendment rights. According to Jones, while he was seated on the ground in full arm and leg restraints (and having recently undergone knee surgery), Legere sprayed him “multiple times” with pepper spray and told him to “die quick.” We note that the video depiction of this incident does not materially refute Jones’ description of the events (although it is not adequate to confirm the key points of his claim, either). If a reasonable jury were to accept these factual allegations as true, that jury might also conclude that the use of force here was not part of a good faith effort to restore discipline, i.e., to get Jones to stand on his own as instructed, and that, instead, the force was used with a malicious purpose. If the leg and arm

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<sup>182</sup> See *supra* notes 1–6 and accompanying text (discussing *Jones*); *infra* note 185 and accompanying text (excerpting *Jones*).

<sup>183</sup> *Jones v. Gelb*, No. 15-1680 (1st Cir. Mar. 23, 2017) (on file with author).

<sup>184</sup> See *supra* notes 1–6 and accompanying text.

restraints—along with Jones’ post-surgical condition—left Jones physically incapable of complying with Legere’s command to get up off the floor, a jury might conclude that Legere could not reasonably have expected that applying pepper spray would achieve the desired result, i.e., that it would cause Jones to stand up willingly on his own. A jury might conclude, instead, that the pepper spray was used for a malicious purpose, in that Legere’s alleged hostile statement (“die quick”) suggests that Legere was motivated out of anger and/or by an intention to inflict pain rather than to gain Jones’ compliance.

The fact that Jones apparently did not suffer a serious injury as a result of this incident is not dispositive. “The ‘core judicial inquiry’ [is] ‘not whether a certain quantum of injury was sustained, but rather whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.’” We cannot conclude at this stage of the proceedings that Legere is entitled to qualified immunity, either.<sup>185</sup>

This is hardly a useless decision. Some may be surprised that such a decision—especially one in favor of a prisoner on an Eighth Amendment claim—has been rendered essentially useless by the First Circuit’s decisional issuance scheme. Of course, not all “missing decisions” are as significant as this one, but at least *some* are.<sup>186</sup>

*Jones*’s status as a “missing decision” may well have mattered to litigants in the First Circuit, especially if subsequent litigation is any indication. Whether use of force in the circumstances of *Jones* is malicious and thus unconstitutional is a fact-sensitive, totality-of-the-circumstances question.<sup>187</sup> In two appeals decided after *Jones*, the First Circuit found the circumstances alleged wanting; it rejected two civil rights claims by incarcerated persons who, like Mr. Jones, alleged unconstitutional use of pepper spray.<sup>188</sup> Although neither case is just like *Jones*, surely the litigants (and the court) might have wanted the benefit of *Jones* when deciding whether other similar uses of force to coerce compliance crossed the constitutional line.

All three decisions may have been right as a matter of fact and law, but the inability of litigants, courts, and constitutional actors to have access to *Jones* is a troubling problem. That the only decision *favorable* to the civil rights claimant

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<sup>185</sup> *Jones*, No. 15-1680, slip op. at 2 (internal citations and quotations omitted).

<sup>186</sup> See also *United States v. Bravo-Garcia*, No. 16-1258, slip op. at 3 (1st Cir. July 10, 2017) (vacating criminal sentence because procedurally unreasonable); *Crawford v. Blue*, No. 15-1545, slip op. at 2 (1st Cir. Oct. 14, 2016) (vacating decision in favor of pro se civil rights plaintiff); *Bogosian v. Hall*, No. 15-1681, slip op. at 5 (1st Cir. Jan. 4, 2017) (vacating, in part, denial of motion for summary judgment on qualified immunity). *Crawford* and *Bravo-Garcia* have been reproduced in their original form in Appendix B.

<sup>187</sup> *Staples v. Gerry*, 923 F.3d 7, 17 (1st Cir. 2019) (quoting *Williams v. Benjamin*, 77 F.3d 756, 763 (4th Cir. 1996)).

<sup>188</sup> *Underwood v. Barrett*, 924 F.3d 19, 20-21 (1st Cir. 2019); *Staples*, 923 F.3d at 17-18.

is missing underscores the capacity of missing decisions to distort the law itself—not simply frustrate our ability to access it. To proceed to trial, Mr. Jones had to pierce the officer’s qualified immunity—that is, he needed to show that the officer’s conduct violated law that was “clearly established” under “cases of controlling authority” or a “consensus of cases of persuasive authority.”<sup>189</sup> Alan Trammell has described this as a “settled law” requirement; once the law becomes “settled,” the violation of those settled rights and duties is actionable in a federal civil rights suit.<sup>190</sup> Section 1983, therefore, “imbues precedents with binding significance in the real world.”<sup>191</sup> Trammell explains further: “More concretely, precedents create affirmative legal obligations for state officials, even if those officials were not parties to the precedent-making lawsuits.”<sup>192</sup>

Were it not submerged, *Jones* would put corrections officers on notice of their legal obligation not to inflict pain or use pepper spray on inmates out of malice (irrespective of injury). *Jones* is not only evidence of what the law is; it is *the law* in the First Circuit. And, apparently, no other case so holds, because the First Circuit cited to *Ninth Circuit* precedent to support its rejection of the officer’s qualified immunity claim.<sup>193</sup> An issuance scheme that frustrates access to a decision like *Jones* does far more than make it difficult for some litigants to find useful precedent; it actually impedes a citizen’s ability to vindicate his or her constitutional rights.

Lest one think I have placed too much weight on *Jones*, consider this missing decision from the Seventh Circuit.<sup>194</sup> In *Bey v. Schwartz*,<sup>195</sup> the court remanded a prisoner civil rights claim that the district court had wrongly dismissed under *Heck v. Humphrey*, which holds that a plaintiff may not use 42 U.S.C. § 1983 to challenge the validity of his conviction (impliedly or otherwise).<sup>196</sup> The court explained in a succinct order that Mr. Bey had not

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<sup>189</sup> *Wilson v. Layne*, 526 U.S. 603, 617 (1999); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (explaining that the trial judge may appropriately determine whether the law was “clearly established” on a motion for summary judgment related to the objective reasonableness of an official’s conduct).

<sup>190</sup> See Trammell, *supra* note 173, at 119; see also Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977, 988-89 (2020) (explaining that the law around § 1983 is settled and enforceable).

<sup>191</sup> Trammell, *supra* note 190, at 989.

<sup>192</sup> *Id.*

<sup>193</sup> See *Jones v. Gelb*, No. 15-1680, slip op. at 2-3 (1st Cir. Mar. 23, 2017) (citing *Furnace v. Sullivan*, 705 F.3d 1021, 1027-30 (9th Cir. 2013)). The Court also cited to Fourth Circuit, Tenth Circuit, and Eighth Circuit decisions in support of its determination that Jones had supported his claim that the officer’s action was motivated by malice or anger and not to obtain compliance. *Id.* at 2.

<sup>194</sup> I am grateful to Joel Flaxman for bringing this example to my attention.

<sup>195</sup> No. 12-1373, 2012 WL 13211886, at \*1 (7th Cir. May 29, 2012). At some point after completing this draft in 2020 and its publication in 2021, Westlaw added *Bey* to its database (presumably at the request of a customer). Notably, many of the cases that cite to *Bey* in the district courts do so without having a “WL” citation. See *infra* note 198 (collecting cases).

<sup>196</sup> 512 U.S. 477, 489-90 (1994).

run afoul of *Heck* because his contention was “that state prison officials held him for longer than the state judiciary authorized,” which was “not a challenge to the state court’s decisions”; rather, it was “an argument that the prison system failed to implement the state courts’ decisions and thus defendants have deprived him of liberty without due process of law.”<sup>197</sup> Apparently, prison officials may have a habit of detaining a prisoner for longer than authorized by law in the Southern District of Illinois because Mr. Bey’s case has been cited more than half a dozen times by judges in the Southern District of Illinois evaluating the sufficiency of complaints raising similar claims.<sup>198</sup> *Bey*’s utility is plain, and it likely has evaded obscurity only because *district court* decisions citing to it have made its reasoning accessible through Westlaw.<sup>199</sup>

At its core, the existence of missing decisions frustrates the reasons why precedential constraint is desirable: fairness, efficiency, and predictability.<sup>200</sup> The screening of decisions makes it difficult to determine whether our appellate courts are treating like cases alike (fairness).<sup>201</sup> It obscures useful decisions from litigants, lower courts, and the public, leaving more work for those applying the law in similar circumstances (efficiency). It leaves others in the dark about how similar cases were, in fact, resolved (predictability). The discovery of missing decisions, thus, reignites the concerns scholars raised over “the accountability, consistency, predictability, and fairness” of unpublished decisions that Rule 32.1 and the E-Government Act were meant to address (at least in part).<sup>202</sup> The presence and extent of missing decisions suggest that both Rule 32.1 and the E-Government Act have failed to achieve

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<sup>197</sup> *Bey*, 2012 WL 13211886, at \*1-2 (7th Cir. May 29, 2012). The Seventh Circuit later clarified that the type of claim Mr. Bey raised is best analyzed under the Eighth Amendment. *Childress v. Walker*, 787 F.3d 433, 438-39 (7th Cir. 2015).

<sup>198</sup> *Johnson v. Ill. Dep’t of Corrs.*, No. 18-01790, 2018 WL 6438580, at \*4 n.4 (S.D. Ill. Dec. 7, 2018); *Evans v. IDOC*, No. 17-763, 2018 WL 1757536, at \*3 n.3 (S.D. Ill. Apr. 12, 2018); *Evans v. Illinois*, No. 17-763, 2017 WL 5972998, at \*2, \*4 nn.2 & 4 (S.D. Ill. Nov. 30, 2017); *Dixson v. Foster*, No. 16-243, 2016 WL 3346055, at \*2 (S.D. Ill. June 16, 2016); *Farris v. Party*, No. 16-302, 2016 WL 3254514, at \*2 (S.D. Ill. June 14, 2016); *West v. Waggoner*, No. 16-189, 2016 WL 3254510, at \*2 (S.D. Ill. June 14, 2016); *Mosley v. Davis*, No. 14-775, 2014 WL 3734171, at \*2 (S.D. Ill. July 29, 2014).

<sup>199</sup> One might say that, as a result, *Bey* isn’t “missing” after all. But imagine whether it would be findable outside of the limited universe of the Southern District of Illinois, where it seems to have made the rounds.

<sup>200</sup> See Schauer, *supra* note 91, at 595-96, 599 (explaining how precedential constraints on judicial decisionmaking are rooted in fairness, predictability, and efficiency); see also Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 8 (2008) (“[P]recedent . . . not only induces consistency in adjudication, but also casts a long shadow beyond. Precedent informs private decisions about whether to litigate, how to structure negotiated settlements or business transactions, and whether and, if so, how to proceed with other activities posing potential legal consequences or risks.”).

<sup>201</sup> See also Hellman Statement, *supra* note 57 (arguing that access to unpublished decisions ensures that “courts satisfy their obligations of accountability”).

<sup>202</sup> See Pether, *supra* note 29, at 1486-87 (discussing perils of “private judging” resulting from unpublished decision practices, including risk that “similarly situated litigants [are] being treated differently”).

their most fundamental transparency goals, depriving litigants, scholars, and the courts of access to useful precedent in the process.

I have, of course, highlighted particularly powerful examples of valuable missing decisions—and I’ve included a few more in Appendix B. Some may wonder—especially given that so many missing decisions affirm the district court’s decision<sup>203</sup>—whether many missing decisions actually have precedential value. The appellate-level reasoning that is “missing” may well be duplicative of reasoning that’s already out there—either in other published or visible unpublished decisions or, perhaps, in the lower court decision that the missing decision affirms. The latter is a problematic assumption, given the well-documented access issues for district court decisions that Boyd, Kim, and Schlanger recently explored.<sup>204</sup> And while some—and perhaps even many—missing decisions likely are duplicative of reasoning already available to us in other forms, that’s surely not always the case, as *Bey* and *Jones* both illustrate (the former becoming useful precedent in the Southern District of Illinois and the latter relying chiefly on out-of-circuit precedent to defend its result). More generally, we cannot assume that affirmances merely reiterate what has occurred below, because appellate courts remain free to affirm on any basis appearing in the record.<sup>205</sup>

Given, moreover, how case- and fact-specific many affirmances may be—especially in certain areas of the law, including qualified immunity dispositions—the affirmance itself has value in its context. It may demonstrate approval of the district court’s reasoning—either in whole or in part. Understanding the scope of that approval has value; for example, in the qualified immunity context, the reviewing court may agree only that a constitutional right was not clearly established—choosing not to endorse a district court’s view of the underlying constitutional issue (assuming one may have been given).<sup>206</sup> If the appellate-level decision is not easily locatable or readily usable but the district court decision is, bench and bar alike might wrongly assume that the district court decision reflects an accurate view of the law. This might create fertile ground for what Maggie Gardner has recently identified as “dangerous citations”—that is, “error introduced in district court opinions” that later gets picked up and reused in district courts and (worse, yet) appellate courts.<sup>207</sup>

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<sup>203</sup> See *supra* Table 9.

<sup>204</sup> See Boyd et al., *supra* note 14, at 489 (“[T]here is significant variation in the types of cases and motion activity that are visible across data sources, and those differences will often lead to differing conclusions about those cases and about judicial behavior.”).

<sup>205</sup> See, e.g., *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 10–11 (1st Cir. 2000) (“Moreover, we do not consider ourselves bound by the trial court’s rationale, but may affirm its judgment for any valid reason that finds support in the record.”).

<sup>206</sup> See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (overruling mandatory sequencing of legal questions to resolve qualified immunity issues).

<sup>207</sup> Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1622 (2020).

### B. *Missing Decisions as “Systemic Facts”*

Irrespective of their utility as precedent, the missing decisions matter still. They are facts about the federal appellate system itself—that is, these are what Andrew Crespo calls “systemic facts.”<sup>208</sup> This new category of judicial factual material involves facts that are neither adjudicative nor legislative, as Kenneth Culp Davis famously described.<sup>209</sup> Unlike their more well-known counterparts, “systemic facts” concern “broader phenomena” about “the judiciary itself”; these facts permit the courts—and the parties who use them—to “look inward” at the system.<sup>210</sup> Such facts may be marshalled as an institutional check on the system, too<sup>211</sup>—but only if we enjoy meaningful access to them.

Collectively, the missing decisions represent a significant percentage of the federal appellate courts’ merits docket—indeed, nearly thirty percent in most years over the last decade.<sup>212</sup> Even where the decisions themselves may not have persuasive value, together, the missing decisions are a rich reservoir of data about how the federal courts adjudicate certain types of appeals—especially those appeals affecting the least popular and most disfavored litigants in the federal system. These decisions are missing, in part, because no one has cared to look for them—a reality that only underscores the need to

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<sup>208</sup> He elaborates:

[Systemic facts] are neither narrowly transactional, like adjudicative facts, nor foreign and external to the decisionmaker, like the archetypal legislative fact. . . . [They] account for information with respect to which a given decisionmaking institution enjoys deep institutional familiarity, privileged (or perhaps even exclusive) access, or both.

Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2067–68 (2016).

<sup>209</sup> Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942); see also Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955) (explaining further the difference between legislative and adjudicative facts). “Adjudicative facts” concern the “immediate parties” and the events and circumstances of the case itself. Crespo, *supra* note 208, at 2066 (internal quotation marks omitted). Legislative facts, on the other hand, are “general,” concerned with “social and economic data” about the world beyond courthouse wall, including, for example, facts about the “psychological effects of racial segregation on minorities,” the “relative safety of surgical procedures,” and the “sociological consequences of same-sex parenting.” *Id.* at 2066 (internal quotation marks omitted).

<sup>210</sup> Crespo, *supra* note 208, at 2052.

<sup>211</sup> Crespo’s work focuses on the capacity of criminal trial courts to marshal systemic facts in constitutional criminal adjudication to combat transactional myopia and enable criminal courts to achieve greater institutional awareness. See generally *id.* Crespo does suggest, however, that systemic factfinding “could illuminate important institutional attributes of . . . [the] courts themselves.” *Id.* at 2101 n.227. He offers two possibilities: “racial disparities related to the protocols [courts] use to compose jury venire pools, or [court] compliance with statutory or constitutional speedy trial guarantees.” *Id.* I use Crespo’s frame more generically here to refer to the body of data that courts as institutions acquire in processing *any* stream of cases—not just criminal cases and not just trial-level dispositions and processes. Appellate courts possess data capable of generating systemic facts, too.

<sup>212</sup> See generally Appendix A.

examine what the missing decisions themselves say about how the federal appellate system administers justice.

The federal courts of appeals have been sorting their output in ways that promote and give greater access to decisions that impact the most powerful in our system: well-lawyered disputes involving complex and interesting legal questions end in easily accessible published opinions. That observation, as a general matter, is not new. More than twenty years ago, scholars exposed the creation of a two-tier system of appellate justice, which benefits the haves at the sake of the have-nots.<sup>213</sup> In a capstone to the most probing work done to date on unpublished decisions, William Richman and William Reynolds observed: “Our thirty-plus years of study have left us with anger and despair over the creation and jealous maintenance of a system that underserves the nation and shortchanges the poor and powerless.”<sup>214</sup> Penelope Pether similarly argued that “unpublication does the work of structural subordination.”<sup>215</sup>

This Article underscores the urgency of these assertions and reveals our inability—at present—to evaluate these charges. It also raises the more troubling possibility that the courts have been complicit in—or, worse, perpetrators of—systemic subordination. But we cannot investigate such a serious charge without easy and navigable access to the decisions that affect the system’s most vulnerable and least powerful. Earlier efforts to address these questions have been incomplete; we have always only seen about seventy percent of the canvas.

The missing decisions likewise are relevant to assessing how sloppy some of the work of the federal appellate system has become.<sup>216</sup> We’ve never had easy access to what are undoubtedly the poorest of the poor decisions, making any systemwide assessment of the quality of the courts’ work nearly impossible. The courts’ decisional procedures have enacted roadblocks—or at least speedbumps—to academic efforts to scrutinize and navigate the second tier of federal appellate process. Richman and Reynolds have warned that “the poor quality of so many unpublished opinions provides stark evidence that there has been a systemic

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<sup>213</sup> Richman & Reynolds, *supra* note 29, at 275-76 (describing two-tier system of federal appellate process); *see also* McAlister, *supra* note 43, at 547-48 (discussing the two-tier system).

<sup>214</sup> RICHMAN & REYNOLDS, *supra* note 20, at ix.

<sup>215</sup> Pether, *supra* note 29, at 1521.

<sup>216</sup> For example, Richman & Reynolds have noted that

[i]n addition to the systemic and structural costs exacted by the courts’ strategy of reducing appellate process in order to accommodate caseload, there is a significant cost in quality as well . . . . Moreover, the poor quality of so many unpublished opinions provides stark evidence that there has been a systemic breakdown in the work product of the circuit courts.

RICHMAN & REYNOLDS, *supra* note 20, at 120-21; *see also* McAlister, *supra* note 43, at 537 (“[T]he creation of the unpublished decision has led to pervasive decisional atrophy—atrophy that has been lamented but largely unexamined.”).

breakdown in the work product of the circuit courts.”<sup>217</sup> Navigable access is essential to any examination of the quality of the court’s work at an institutional level.

Consider another way in which the missing decisions might serve as “systemic facts.” The U.S. Court of Appeals for the Eleventh Circuit issued a remarkable set of opinions in March 2019,<sup>218</sup> revealing profound internal disagreement over its publication practices for requests to file second or successive habeas petitions under 28 U.S.C. § 2255(h) and § 2244.<sup>219</sup> The controversy involved a high volume of petitions (over 2,200) seeking relief under *Johnson v. United States*,<sup>220</sup> which had held a portion of the Armed Career Criminal Act unconstitutionally vague, and under *Welch v. United States*,<sup>221</sup> which had made *Johnson* fully retroactive. Apparently in an effort to regulate the practice within the Eleventh Circuit, panels began publishing decisions resolving certain of these requests.<sup>222</sup> In the process, the court made law that bound future panels and, in the view of some members of the court, it did so undesirably and unfairly.<sup>223</sup> These concerns were heightened because of the limited adversarial nature of the requests to file second or successive habeas petitions under § 2255(h) and § 2244(b).<sup>224</sup>

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<sup>217</sup> RICHMAN & REYNOLDS, *supra* note 20, at 121.

<sup>218</sup> See *United States v. St. Hubert*, 918 F.3d 1174 (11th Cir. 2019) (en banc); *id.* at 1174 (Tjoflat, J., concurring in the denial of rehearing en banc); *id.* at 1179 (Jordan, J., concurring in the denial of rehearing en banc); *id.* at 1196 (Wilson, J., dissenting from the denial of rehearing en banc); *id.* at 1199 (Martin, J. dissenting from the denial of rehearing en banc).

<sup>219</sup> Federal appellate courts may authorize the filing of second or successive habeas petitions when the petition raises a “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable” to the federal habeas petitioner. 28 U.S.C. § 2255(h). To seek permission to file a successive petition under § 2255(h), the habeas petitioner files a request in the applicable circuit court of appeals. § 2244(b)(3). A three-judge panel reviews the request and grants permission for the filing “if [the panel] determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.” § 2244(b)(3)(B)–(C). The court is supposed to act on the request within thirty days, § 2244(b)(3)(D), and the decision “shall not be the subject of a petition for rehearing or for a writ of certiorari.” § 2244(b)(3)(D)–(E).

<sup>220</sup> 576 U.S. 591, 597–98 (2015).

<sup>221</sup> 136 S. Ct. 1257 (2016). It is worth pointing out that the lower court’s decision in *Welch* was itself a “missing decision”—a single-judge order by a judge on the Eleventh Circuit denying a certificate of appealability. See *Welch v. United States*, No. 14-15733 (11th Cir. June 9, 2015).

<sup>222</sup> See *St. Hubert*, 918 F.3d at 1179 (Tjoflat, J., concurring in the denial of rehearing en banc) (“In 2016 after the *Johnson* and *Welch* decisions, there was a heightened need to publish at least some of these 2,282 orders to establish precedent, to provide consistency in panel rulings in so many cases, and to facilitate the administration of these matters.”). Judge Tjoflat’s explanation as to the need for consistency in administering the requests likewise suggests the importance of navigable access to these decisions to enable the court, the public, and academics to evaluate the evenhanded administration of this process.

<sup>223</sup> See *id.* at 1207–08 (Martin, J., dissenting from the denial of rehearing en banc) (“[I]t is not the number of published opinions I take issue with. I take issue with the practice itself. As Mr. St. Hubert’s case illustrates, any one published order that prematurely and in my view mistakenly resolves an open merits question forecloses that issue for all future panels.”).

<sup>224</sup> See *id.* at 1210 (explaining that published decisions on second or successive petitions did not have “the usual robust process that ordinarily attends our Circuit precedent”); see also *id.* at 1191



Although the sharp disagreement among members of the court focused on the use of *published* orders to bind, lurking in the background was the specter of what had happened to the rest of the 2,000 decisions that the court had not published. Indeed, we see a glimpse in Judge Beverly Martin's dissent from the denial of rehearing en banc on the use of published orders: she discussed the case of Stoney Lester, whose request for permission to proceed with a successive petition had been granted in an unpublished order.<sup>225</sup> There's no commercial database citation for the *Lester* decision; it's a missing decision. But Martin deploys it as a kind of systemic fact that would have been lost otherwise to those outside the court—that is, to those who had not been responsible (personally) for the court's review of more than 2,000 similar requests. She offered Mr. Lester's case as an “example of . . . how our get-permission process should operate.”<sup>226</sup> The irony should not be lost: the published decisions on the successive petitions approval process undesirably bound the Eleventh Circuit, some judges argued, while “missing decisions” were held up, instead, as compelling examples of how the process should have operated.

Martin's use of a missing decision to challenge her colleague's approach to the second or successive process foreshadows an important objection to the solution discussed in the next Part. Some judges may find strategic advantage in issuing decisions under the radar of disagreeing colleagues. Indeed, such decisions may serve valuable institutional aims, permitting panels, as I have explained, to “avoid”<sup>227</sup> (temporarily or not) controversial or thorny issues over which there is only high-level agreement as to outcome.<sup>228</sup> Exposing those decisions by making them widely and freely available might have unintended consequences and restrict appellate panels from doing justice when they are reluctant to make law.

That argument should garner some sympathy; such use of unpublished decisions may be the least problematic for reasons discussed elsewhere.<sup>229</sup> I

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(Jordan, J., concurring in the denial of rehearing en banc) (suggesting that court might decide such orders are binding “only when there has been adversarial briefing”).

<sup>225</sup> *Id.* at 1203 (“I offer the example of a case brought by a man named Stony Lester, because it illustrates how our get-permission process should operate. See *In re Stoney Lester*, No. 16-11730-A, slip op [(May 19, 2016)]. Mr. Lester sought leave to file a second or successive § 2255 motion in light of the Supreme Court's holding in *Johnson*.”).

<sup>226</sup> *Id.*

<sup>227</sup> See McAlister, *supra* note 43, at 574 (explaining that “avoidant decisions” are “facially under-reasoned decisions” that “bear[] the features of ordinary appellate process, including oral argument and counsel” but result in decisions that “say[] very little, and may slip below the radar” as “perfunctory unpublished decision[s]—perhaps precisely as the ‘avoidant’ panel intended”). “Avoidant” unpublished decisions usually involve thorny, novel, important, or complex issues over which there may be panel agreement as to outcome but not as to reasoning. *Id.* at 586.

<sup>228</sup> See *id.* at 588-89 (identifying “limited role for avoidant decisions” and “find[ing] room for some avoidant decisions in an unpublication scheme”).

<sup>229</sup> See *id.* at 586-88 (describing legitimate use of unpublished decisions to avoid issues).

do not argue here for a transparency mandate in reason giving—that is, that courts *always* explain themselves. Instead, I ask only that courts make their results easily and freely navigable. That more limited type of transparency does not require courts to abandon practices that may serve weighty institutional interests or permit case-specific decisions in the interests of justice. But we should have free and usable access to those results. Indeed, without it, instances where courts have employed corrective justice may lead to inconsistent and unfair justice. Why should one litigant benefit from relief in strikingly similar circumstances and the other not have navigable access to that decision so that she may argue for the same result?

Finally, this Article has largely assumed that decisions “go” missing—not that they are *intentionally* hidden by the courts or by the authoring judges. But what if that’s not the case? What if, instead, courts have developed a decisional issuance scheme that ensures that some decisions are harder to find, thus shaping public perception of the court’s work—whether by obscuring access to its most poorly reasoned work or, perhaps, by making certain classes of decisions harder to find (for example, cases like *Jones* and *Bey*)? That possibility echoes the concerns about judicial discretion—here deployed to make only certain decisions visible, depending on what kind of order the court uses to resolve the appeal—that others have raised about the use of unpublished decisions to avoid establishing constitutional rights for civil rights plaintiffs.<sup>230</sup> And were it true, it would only underscore the urgency of a solution, which I turn to next.

#### IV. THE SOLUTION

The problem of missing decisions has a solution within easy reach of both the commercial databases and the federal appellate courts. But, for reasons explained in this Part, the solution likely must come from the courts themselves. They are responsible for the scheme that limits free access to their decisional output on court websites. Although the courts may have been unaware of how that scheme affects navigable access to decisions in commercial databases, now that they are aware, the courts are in the best position to fix the problem.

First, however, consider why commercial databases may not solve the problem of missing decisions on their own. Although the databases respond to consumer demand to *add* material, if I’m right that the class of “missing decisions” involves the least powerful and popular litigants, it seems highly unlikely that market forces will fix these access and navigation problems. The class of cases that are missing are not the ones that the highest paying users of

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<sup>230</sup> See Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 62, 115-16 (2016) (finding that nearly twenty percent of decisions recognizing new constitutional rights are unpublished and arguing that discretion with respect to the qualified immunity inquiry and the decision whether to publish leads to observable strategic behavior by appellate panels).

commercial databases—i.e., private attorneys and large law firms—usually are looking to retrieve.<sup>231</sup> What's missing are the decisions that the free or reduced-fee users of commercial databases are most likely to need or seek (including those working on behalf of criminal defendants in federal defenders' offices, law clerks and court staff, other nonprofit lawyers, pro se litigants, and academics). The point is: the *paying* customers may not push the databases to incur costs to recover missing decisions, and their absence most significantly affects those who pay the least (or not at all) for access. The users most affected by the missing decisions are not those who can move the market.

That said, the commercial databases of course could take significant steps to address the problem—and I urge them to do so. That substantive decisions are missing may be deeply concerning; that the commercial databases who profit from their control of our law have not incurred the expense or undertaken the effort to ensure the completeness of their databases is also troubling. The debate over the wisdom and propriety of the commercial databases' stranglehold on our law are beyond the scope of this work,<sup>232</sup> but this Article offers yet another example of the costs of such a system. I hope my work may provide a template for how these databases can ensure that they recover what has been lost—at least going back to January 1, 2007, the date after which all that is missing is usable as persuasive law in every circuit.

For these reasons, the fix likely must come from the courts. Not only are the courts best positioned to solve the problem, but they are also responsible for it. The courts have failed to live up to the promise of—and arguably failed to comply with—the E-Government Act itself. The Act left each federal court to fend for itself at the direction of its respective chief judge<sup>233</sup>—inviting the kind of disparate schemes this Article identifies.<sup>234</sup>

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<sup>231</sup> See Olufunmilayo B. Arewa, *Open Access in A Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 830-31 (2006) (“Lexis and Westlaw services are particularly suited to large law firms that bill clients. The high costs of Lexis and Westlaw, however, means that users in certain market segments may not be able to pay the prices that Lexis and Westlaw charge under their traditional pricing models.”).

<sup>232</sup> See generally Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 J. INTELL. PROP. L. 205, 206 (2019) (explaining how publication has merged with “ownership” of law in the United States and identifying harms from publishers’ use of “powerful legal tools to control who has access to the text of the law, how much they must pay, and under what terms”).

<sup>233</sup> 44 U.S.C. § 3501 note (explaining that “[t]he Chief Justice . . . shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website” with written opinions). Chief judges—a rotating and temporary position, see 28 U.S.C. § 45(3)(A)—are the “chief administrative leaders for their individual circuits.” Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *The Role and Impact of Chief Judges on the United States Courts of Appeals*, 24 JUST. SYS. J. 91, 91 (2003).

<sup>234</sup> See Martin, *supra* note 16, at 313 (tasking each chief judge with ensuring compliance “invited a wide range of methods and degrees of compliance”).

In the short term, I urge the Judicial Conference—the policy-making branch of the federal courts—to charge the Chief Judges of each circuit with ensuring free public access to all unsealed final, judge-issued decisions from the federal appellate courts.<sup>235</sup> The Chief Justice of the United States chairs the Judicial Conference,<sup>236</sup> and he has initiated policy-reform efforts on the part of the Judicial Conference and the Administrative Office before.<sup>237</sup> He has the power to do so again.

The Judicial Conference also can fix the problem of missing decisions by issuing new guidance that expansively construes the courts' obligations under the E-Government Act. Wayward early guidance under the E-Government Act may be partly (or even entirely) to blame for missing decisions.<sup>238</sup> That guidance essentially determined that the then-in-development PACER system “may be used to satisfy” the Act’s “searchability” requirement for access to the “substance” of court opinions.<sup>239</sup> PACER, in turn, gives free access to certain court orders—but only those designated as “written opinions” consistent with the E-Government Act.<sup>240</sup>

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<sup>235</sup> This is not a new call—at least with respect to all unpublished decisions. Arthur Hellman persuasively argued to Congress nearly two decades ago that “all of the courts of appeals should make their unpublished dispositions available in electronic form to publishers and other information providers.” Hellman Statement, *supra* note 57. Regardless of whether the decisions are citable as precedent, Hellman explained, “the legal community and other citizens have a strong interest in knowing how the courts are carrying out their work of resolving disputes and applying the law.” *Id.*

<sup>236</sup> See JOHN G. ROBERTS, JR., CHIEF JUST. OF THE U.S., 2018 YEAR-END REPORT ON THE FEDERAL JUDICIARY, at 6 <http://supremecourt.gov/publicinfo/year-end/2018year-endreport.pdf> [<https://perma.cc/3SFR-UVPF>] [hereinafter 2018 YEAR-END REPORT] (explaining that the Chief Justice chairs the Judicial Conference of the United States).

<sup>237</sup> JOHN G. ROBERTS, JR., CHIEF JUST. OF THE U.S., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY, at 11 <http://supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf> [<https://perma.cc/MY4B-SQ9E>] (directing the “Director of the Administrative Office to assemble a working group to examine our practices and address [sexual harassment] issues”); see also 2018 YEAR-END REPORT, *supra* note 236, at 6-7 (describing Judicial Conference working group on sexual harassment policies).

<sup>238</sup> Memorandum from Leonidas Ralph Mecham, Dir., Admin. Off. of the U.S. Cts., Regarding Compliance with Website Requirements of the E-Government Act, to All Chief Judges, U.S. Courts 2 (Nov. 10, 2004), [http://www.access-to-law.com/pacer/AO\\_Mecham\\_memo\\_Nov2004.pdf](http://www.access-to-law.com/pacer/AO_Mecham_memo_Nov2004.pdf) [<https://perma.cc/F8CR-UZAS>] [hereinafter “Mecham Memorandum”] (clarifying the initial guidance on written opinions for the E-Government Act).

<sup>239</sup> *Id.* (“A combination of CM/ECF and the PACER systems may be used to satisfy the searchability requirement, as these systems allow for searching within a document.”).

<sup>240</sup> As Peter Martin has explained:

In response to the E-Government Act, the Administrative Office of the U.S. Courts, operating under Judicial Conference guidance, issued a new version of the CM/ECF software that, once installed by a court, incorporated two changes that applied to all documents in its system tagged as a ‘written opinion.’ The first exempted all documents so designated from PACER fees. . . . [A] second and more important change to PACER was the addition of a ‘Written Opinions Report.’ This operates only at the individual court level.

Martin, *supra* note 16, at 320

The “official guidance” left “written opinion” designation choices up to the “authoring judge”; she was responsible—through direction to a “user filing on behalf of a judge”—for determining whether a particular decision satisfied the Act’s “written opinion” threshold.<sup>241</sup> On the one hand, the authoring judge was told that a “written opinion” was “any document issued by a judge or judges of the court, sitting in that capacity, that sets forth a reasoned explanation for a court’s decision.”<sup>242</sup> On the other hand, for appellate courts, “only those documents designated as opinions of the court”—an undefined term—“meet the definition of ‘written opinion.’”<sup>243</sup> Rather than mandate access to all final orders or opinions, or even just to all reasoned decisions, the Judicial Conference devolved these designation decisions to individual judges.

Whatever hopes we may have had for the E-Government Act, individual compliance determinations and decisional issuance schemes have effectively thwarted widespread, free, and navigable access to all federal appellate decisions. How much each court makes available for free on its website is a decision left entirely to each individual court, authoring judge, or administrative clerk filing each respective decision. That must change to solve the problem of missing decisions, and updates to the 2004 guidance is a good place to start.<sup>244</sup>

Another solution would be to make PACER free; indeed, this work may provide yet another reason why PACER should be free and reformed for enhanced usability.<sup>245</sup> But privacy issues related to personally sensitive information in court-filed documents loom large in that debate.<sup>246</sup> My proposal, thus, is more narrowly drawn to avoid privacy concerns over

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<sup>241</sup> Mecham Memorandum, *supra* note 238, at 3 (“CM/ECF will be modified to ask a user filing on behalf of a judge whether the document being filed meets the definition of ‘written opinion’ at the time of docketing in CM/ECF.”).

<sup>242</sup> *Id.* at 2. The guidance clarified that “routine, non-substantive orders” were not “written opinions.” *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 3.

<sup>245</sup> As of February 2019, Congress was considering bipartisan legislation to do away with PACER’s paywall. See Patrick L. Gregory, *PACER’s Court Records Should Be Free Lawmakers Say*, BLOOMBERG L. (Feb. 13, 2019, 5:09 PM), <https://news.bloomberglaw.com/us-law-week/bipartisan-bill-introduced-to-make-pacer-docs-free> [<https://perma.cc/2U7P-V5CR>]; Seamus Hughes, *The Federal Courts Are Running an Online Scam*, POLITICO (Mar. 20, 2019), <https://www.politico.com/magazine/story/2019/03/20/pacer-court-records-225821> [<https://perma.cc/P4W7-M6PL>].

Litigation over PACER’s fees and how the judiciary spends those fees is ongoing. See, e.g., Nat’l Veterans Legal Servs. Program v. United States, 291 F. Supp. 3d 123 (D.D.C. 2018) (holding that use of PACER fees to fund certain judiciary projects exceeded congressional authorization for use of fees), *aff’d* 968 F.3d 1340, 1350 (Fed. Cir. 2020) (holding that fees must be limited to the expenses “incurred in services providing public access”); Perry Cooper, *Federal Circuit Hammers Government on Use of PACER Fees*, BLOOMBERG L. (Feb. 3, 2020, 3:47 PM), <https://news.bloomberglaw.com/ip-law/federal-circuit-hammers-government-on-use-of-pacer-fees> [<https://perma.cc/4RLV-LXFG>]; Adam Liptak, *Attacking a Pay Wall That Hides Public Court Filings*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/us/politics/pacer-fees-lawsuit.html> [<https://perma.cc/YB42-BDXY>].

<sup>246</sup> See, e.g., Schultze, *supra* note 67, at 1205-09 (discussing privacy concerns with free PACER).

whether and how to free PACER from its restrictive paywall. I propose, instead, that the Judicial Conference issue guidance requiring courts to make all judge-issued unsealed decisions, which are already stripped of personally sensitive information, freely available on court websites.

Why insist on access to all judge-issued final decisions and not, more limitedly, all *reasoned* final decisions? The discovery of missing decisions calls into question the courts' ability to make slippery choices between what is reasoned and what is not. If the courts have decided that some decisions are simply not reasoned enough to be helpful to litigants, they are not careful in that inquiry if decisions like *Jones v. Gelb* slip through the cracks. Better to have access to *all* decisions; technology can separate wheat from chaff.<sup>247</sup>

I would limit my proposal in one respect: courts need not make available *all* procedural terminations on court websites for free; they only need to ensure robust access to those procedural terminations that result from court, rather than clerk, action. Many procedural terminations may have little public value (for example, voluntary dismissals and dismissals for failure to prosecute).<sup>248</sup> For that reason, I propose requiring courts to make only judge-issued (as opposed to clerk-ordered) procedural terminations, which would include any dismissal for lack of jurisdiction, publicly and freely available. Judge-ordered terminations of all types should be available on court websites.

There's another reason to insist on broad free access—a reason that takes a less charitable view of the courts. It's possible that the federal appellate court's decisional scheme has developed by design. Some federal appellate judges expressed strong opposition to Rule 32.1 and its liberalized reliance on unpublished decisions.<sup>249</sup> Decisional issuance schemes—and the selective free access that they entail—may be the contemporary equivalent of a no-citation ban. Future work should plumb this issue. For now, fears of court complicity or, worse, court instigation, should strengthen the call for a broad free-access mandate.

It also strengthens the call for congressional action. To ensure access to court decisions irrespective of any Judicial Conference action, Congress should consider legislation requiring free, public access in a keyword-searchable form to all final judicial decisions of the federal appellate courts. The Government Printing Office's existing consolidated federal court

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<sup>247</sup> See Martin, *supra* note 200, at 44 (arguing that “[t]he rapid development of sophisticated Internet search tools provides strong evidence that with the right combination of public sector involvement and private sector competition in the dissemination of legal information, [information overload] need not occur”).

<sup>248</sup> See *supra* notes 107–112 and accompanying text (discussing types of procedural terminations).

<sup>249</sup> See, e.g., Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 36, 37 (“When the people making the sausage [i.e., unpublished decisions] tell you it’s not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it [i.e., cite to them] anyway.”).

opinions database, FDsys, could be used to provide that free, keyword-searchable access to the work of the federal appellate courts.

All of these solutions are not just technically feasible—indeed, the technical infrastructure already exists—but the federal courts make more than enough money off of the PACER system fees to pay for these reforms.<sup>250</sup> It is past time that the U.S. Courts of Appeals ensure meaningful, complete, and free access to their work product—to our law.

### CONCLUSION

Core assumptions about our ability to use technology to access and navigate useful precedent from the federal appellate courts are not—and never have been—true. The courts are best positioned to eliminate accessibility and usability issues once and for all. Given the sophistication of technological tools to filter and isolate useful precedent, we should worry less about information overload and worry more about our ability to access, scrutinize, and use the entire work of the federal appellate courts. What’s missing may well affect those who litigate the most but who are the least likely to effect change in institutional design. Let this work be the beginning of the solution.

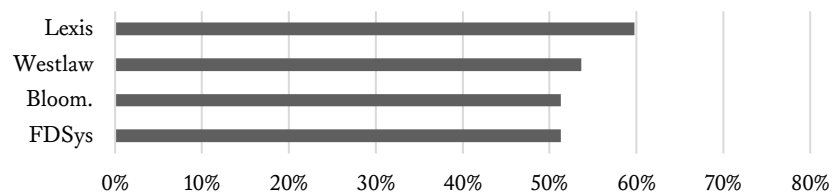
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<sup>250</sup> See Carissa Byrne Hessick, *Paying for Public Records*, PRAWFSBLAWG (Feb. 13, 2019, 11:15 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2019/02/paying-for-public-records.html> [https://perma.cc/3GJ6-TPZC] (reporting that while PACER charges a fee of \$0.10 per page, the estimated cost of retrieving a page is estimated to be “only \$0.000006 per page” and that PACER “brought in more than \$146 million in fees during the 2016 fiscal year, even though it cost just over \$3 million to operate” (quoting Corrected Opening Brief of Plaintiffs-Appellants, *Nat’l Veterans Legal Servs. Program*, 968 F.3d 1340 (Fed. Cir. 2020) (Nos. 19-1081(L), 19-1083); Matt Ford, *The Courts Are Making a Killing on Public Records*, NEW REPUBLIC (Jan. 31, 2019), <https://newrepublic.com/article/153003/courts-making-killing-public-records-pacer-fees> [https://perma.cc/A2VD-E7AK]).

## APPENDIX A

What follows are figures depicting (1) the maximum possible percentage of available merits terminations across all geographic federal appellate courts in each twelve-month period ending on September 30 between 2008 and 2016; and (2) the maximum possible percentage of available merits terminations per circuit in each twelve-month period ending on September 30 between 2016 and 2008. Similar figures for the twelve-month period ending on September 30, 2018 and September 30, 2017 appear in the body of the Article.

**Figure 1.1: Maximum Possible Percentage of Coverage for Merits Terminations for Each Database in 2016**



**Figure 1.2: Maximum Possible Percentage of Coverage for Merits Terminations in Each Circuit in 2016**

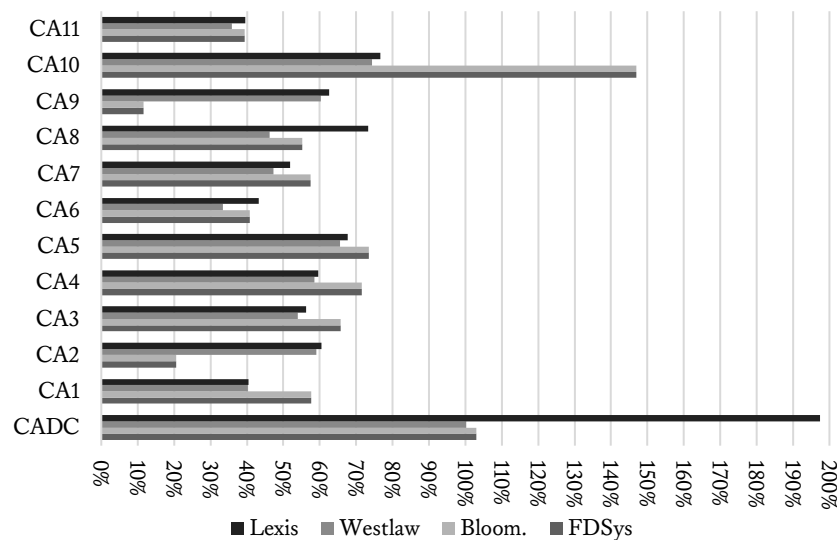




Figure 2.1: Maximum Possible Percentage of Coverage for Merits Terminations in Each Database in 2015

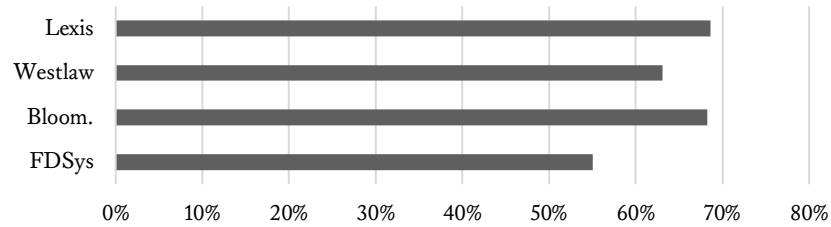


Figure 2.2: Maximum Possible Percentage of Coverage for Merits Terminations in Each Circuit in 2015

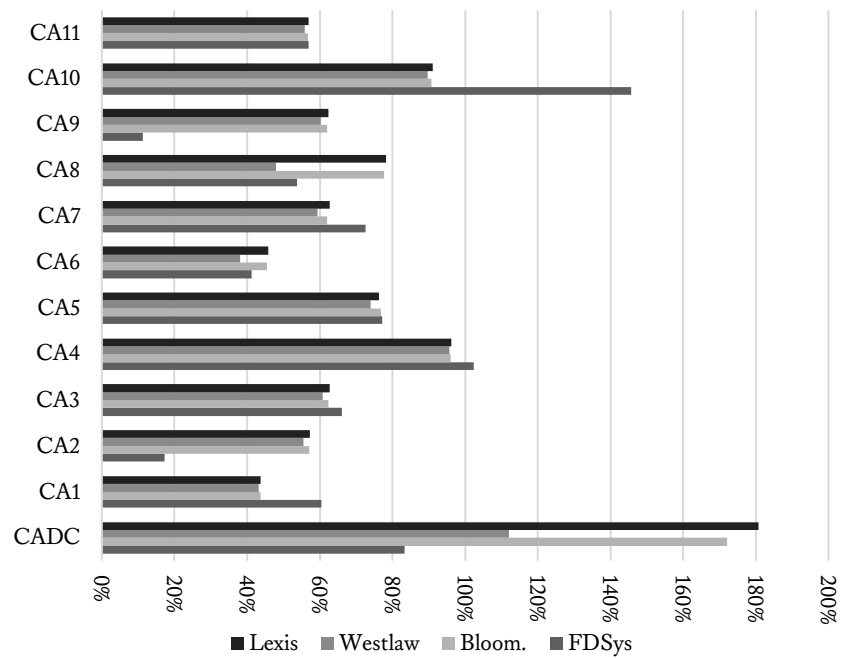


Figure 3.1: Maximum Possible Percentage of Coverage for Merits Terminations in Each Database in 2014

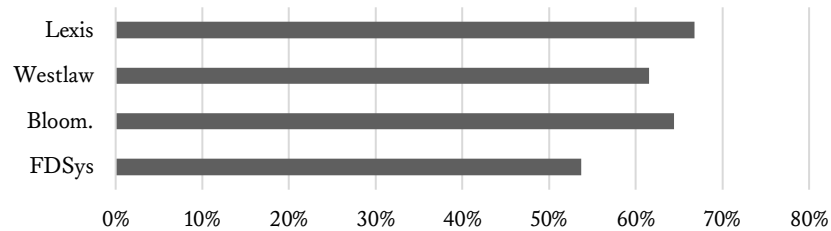
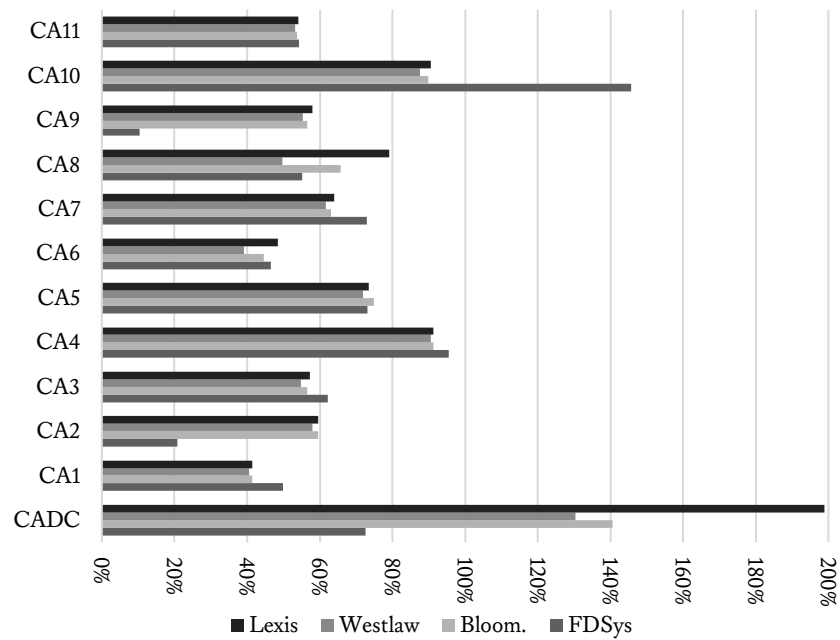
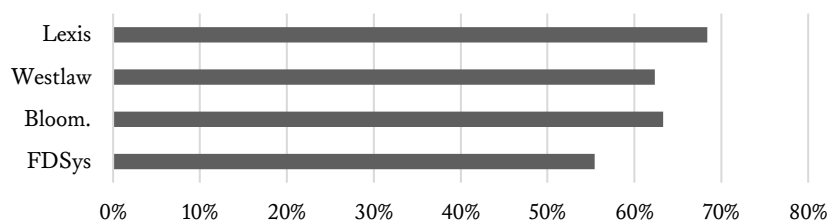


Figure 3.2: Maximum Possible Percentage of Coverage for Merits Terminations in Each Circuit in 2014



**Figure 4.1: Maximum Possible Percentage of Coverage for Merits Terminations in Each Database in 2013**



**Figure 4.2: Maximum Possible Percentage of Coverage for Merits Terminations in Each Circuit in 2013**

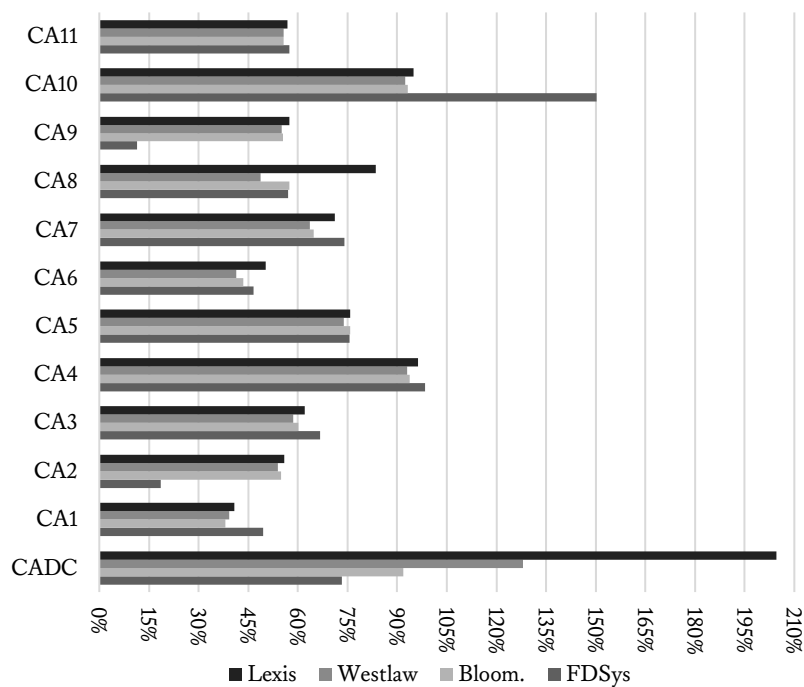


Figure 5.1: Maximum Possible Percentage of Available Merits Terminations in Each Database in 2012

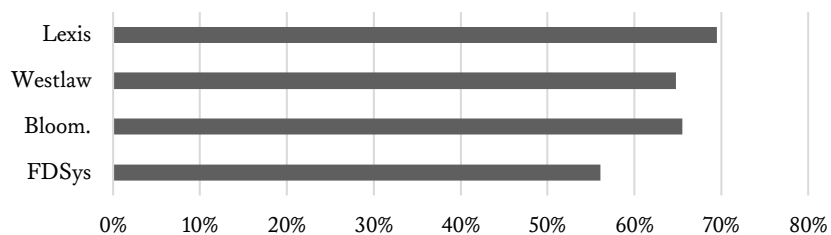


Figure 5.2: Maximum Possible Percentage of Coverage for Merits Terminations in Each Circuit in 2012

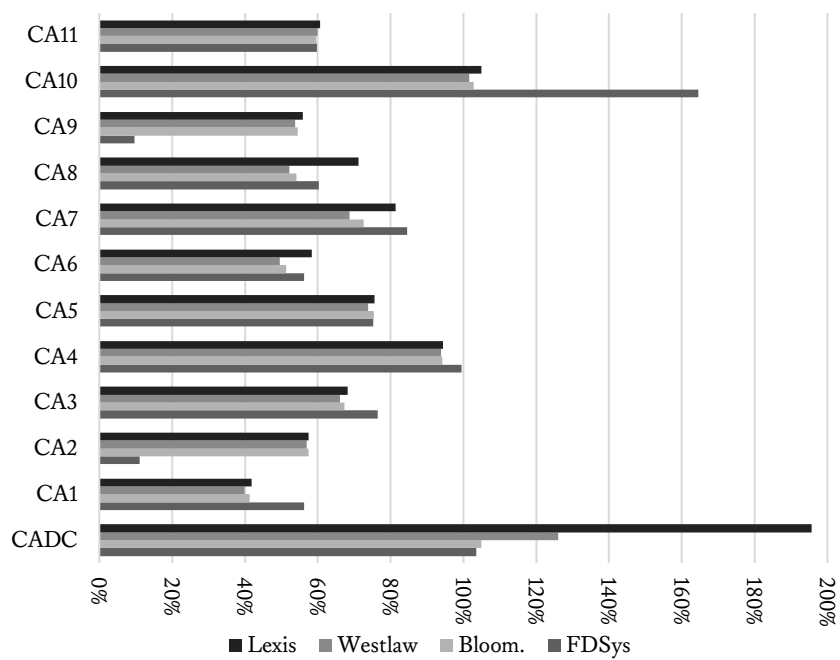


Figure 6.1: Maximum Possible Percentage of Available Merits Terminations in Each Database in 2011

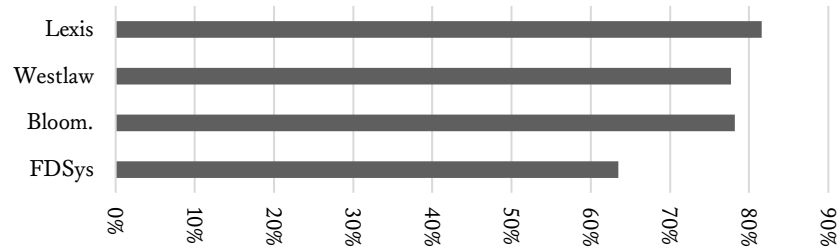


Figure 6.2: Maximum Possible Percentage of Coverage for Merits Terminations in Each Circuit in 2011

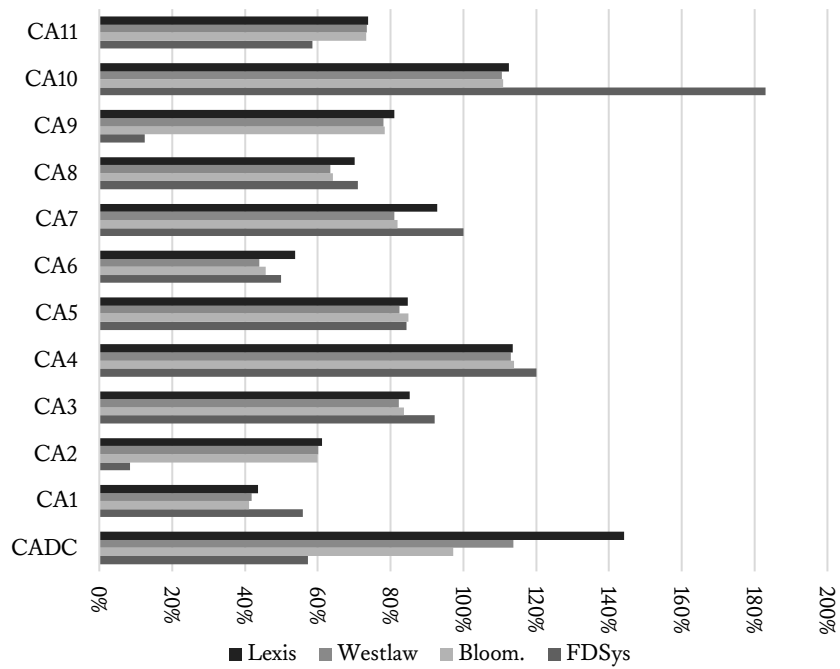


Figure 7.1: Maximum Possible Percentage of Available Merits Terminations in Each Database in 2010

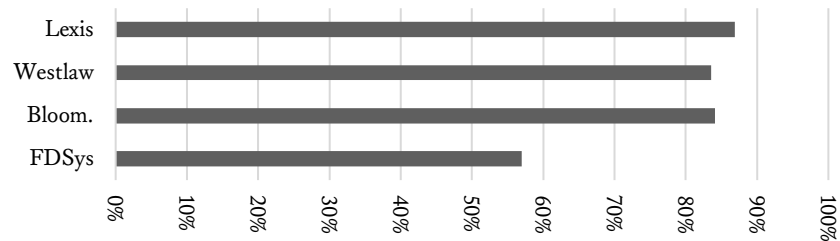


Figure 7.2: Maximum Possible Percentage of Coverage for Merits Terminations in Each Circuit in 2010

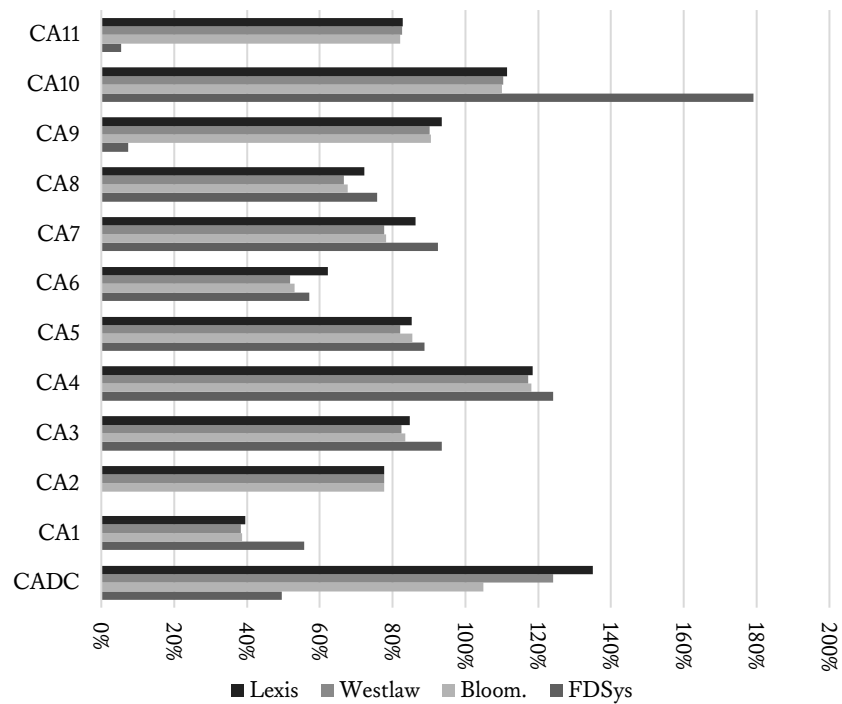


Figure 8.1: Maximum Possible Percentage of Available Merits Terminations in Each Database in 2009

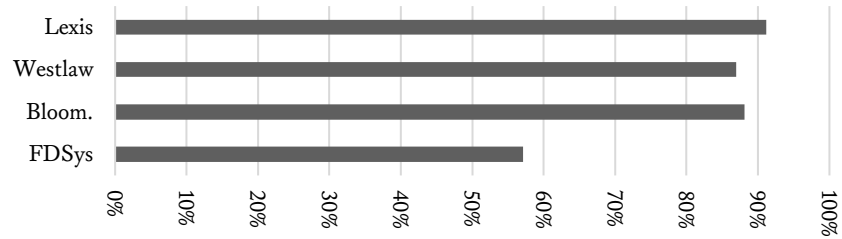


Figure 8.2: Maximum Possible Percentage of Coverage for Merits Terminations in Each Circuit in 2009

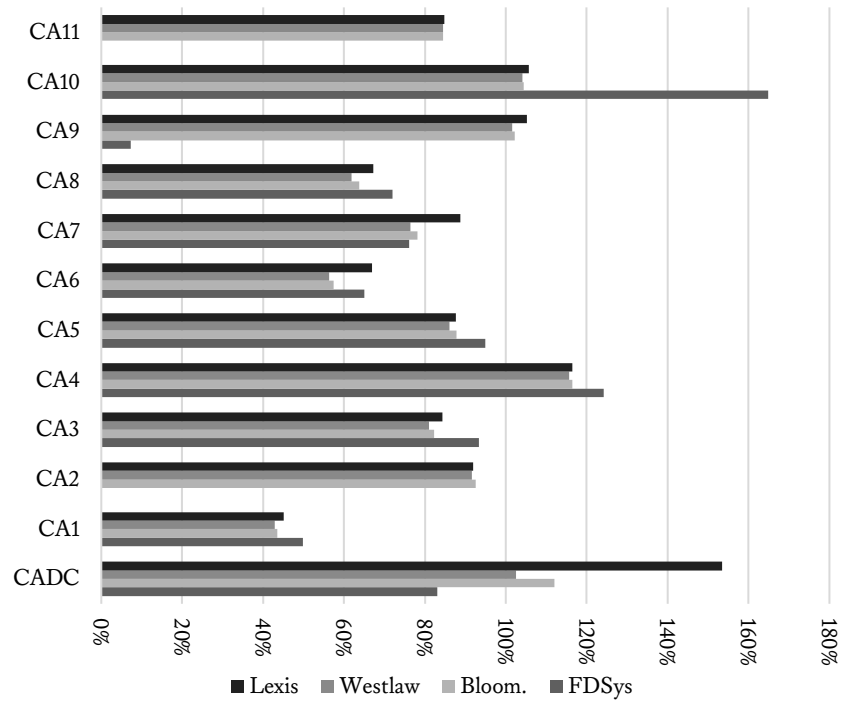


Figure 9.1: Maximum Possible Percentage of Available Merits Terminations in Each Database in 2008

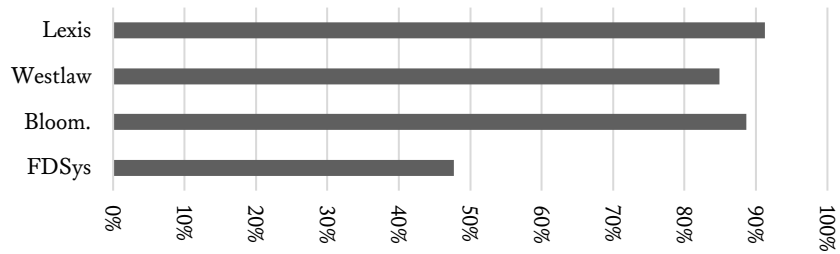
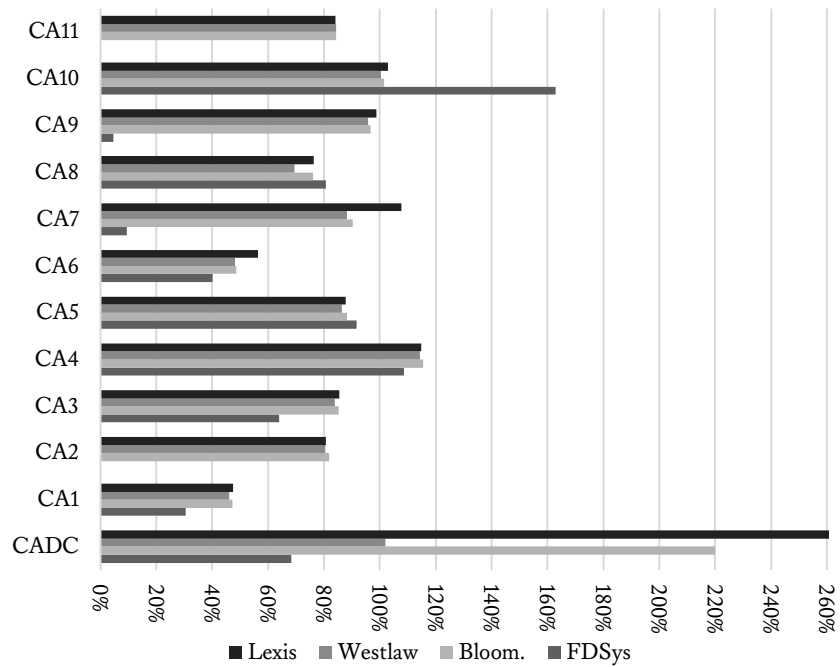


Figure 9.2: Maximum Possible Percentage of Coverage for Merits Terminations in Each Circuit in 2008





## APPENDIX B

What follows are two examples of “missing decisions” from the U.S. Court of Appeals for the First Circuit issued during the 2016 to 2017 Administrative Office Reporting cycle.

## United States Court of Appeals For the First Circuit

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No. 16-1258

UNITED STATES OF AMERICA,

Appellee,

v.

ANGELITA BRAVO-GARCÍA,

Defendant, Appellant.

---

BeforeTorruella, Thompson, and Barron,  
Circuit Judges.

---

**JUDGMENT**

Entered: July 10, 2017

Defendant-appellant Angelita Bravo-García ("Bravo") was indicted for possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). She pled guilty without a plea agreement. Bravo's Pre-Sentence Report ("PSR") established a Base Offense Level ("BOL") of 20 for violating 18 U.S.C. § 922 with a prior "controlled substance offense," pursuant to U.S.S.G. § 2K2.1(a)(4)(A); see also U.S.S.G. § 4B1.2(b) (defining "controlled substance offense"). Her Total Offense Level was calculated to be 18, given a two-level decrease for acceptance of responsibility. U.S.S.G. § 3E1.1(a); The PSR also assigned Bravo a Criminal History Category of III. Combined, these gave Bravo an advisory Guidelines sentencing range of thirty-three to forty-one months of imprisonment.

Bravo objected to the calculation of her BOL and challenges her sentence in this appeal, arguing that none of her prior convictions qualify as a "controlled substance offense" as defined by U.S.S.G. § 4B1.2(b) and that her sentence should not therefore be enhanced.<sup>1</sup> Bravo argued

---

<sup>1</sup> Bravo also argues that the district court erred in imposing a nighttime curfew and electronic monitoring for six months as special conditions of her supervised release. Because we remand

On appeal, Crawford "agrees that the process for challenging the \$140 [citation] is constitutionally adequate except for the \$25 . . . 'filing fe[e].'" In his view, "[t]he \$25 exaction violates due process because there is no notice and opportunity for a hearing prior to the final deprivation" of the \$25. "The issue is not whether there is a fundamental right of 'cost free access to the courts,' as defendants argue[d below] . . . but rather whether a person may be deprived of his money, a traditional property interest undeniably within the plain language of the Due Process Clause," without notice or an opportunity to be heard. According to Crawford, the district court "failed to conduct a Mathews weighing" of the competing due process interests<sup>1</sup> and failed to consider "substitute procedural safeguards such as imposing costs only after a motorist is found responsible, or refunding the filing fees paid by those who are not found responsible."

We think the judgment of the court was too summary in the circumstances. The balancing test in Mathews calls for closer attention to each of three familiar factors, which the district court should revisit on remand at the summary judgment stage and in such further proceedings as may prove necessary:

--the private interest at stake, which, though small (\$25), is a precondition to any hearing of the relatively "consequential" and "serious matte[r]" of traffic violations--which can potentially part a person from his or her license (or worse), Gillespie v. City of Northampton, 950 N.E.2d 377, 387 (Mass. 2011)--as hearings are available only in a judicial proceeding, upon payment of the filing fee, with no apparent opportunity for prior administrative review;

--the risk of an erroneous deprivation of such interest through the appeals procedure used--concerning which Crawford seems to have sought discovery of statistical evidence--and the probable value of additional or substitute procedural safeguards; and

--the Commonwealth's interest, including the function involved and the fiscal and administrative burdens of any additional or substitute procedural safeguards. In this final regard, we note that for decades "[b]efore July 1, 2009, no fee was required to challenge a [traffic] citation before a clerk-magistrate," Police Dept. of Salem v. Sullivan, 953 N.E.2d 188, 191 (Mass. 2011); and that in Massachusetts, there are cost-free avenues to be heard initially for parking violations that are issued in the "several million[s]." Gillespie, 950 N.E.2d at 381, 384-85.

We take no view as to how the Mathews balancing test should come out or what remedy (if any) might be warranted. Nor do we take any view as to the related suspension of Crawford's operating privileges. The judgment of the district court is vacated for further proceedings consistent with this judgment.

By the Court:

/s/ Margaret Carter, Clerk

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<sup>1</sup> Under Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), the court must appropriately accommodate the importance of the private interest; the likelihood of governmental error; and the magnitude of the governmental interests involved.

cc:

Hon. William G. Young

Robert Farrell, Clerk, United States District Court for the District of Massachusetts

Peter A. Crawford

Douglas S. Martland

## United States Court of Appeals For the First Circuit

---

No. 16-1258

UNITED STATES OF AMERICA,

Appellee,

v.

ANGELITA BRAVO-GARCÍA,

Defendant, Appellant.

---

BeforeTorruella, Thompson, and Barron,  
Circuit Judges.

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### JUDGMENT

Entered: July 10, 2017

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Bravo objected to the calculation of her BOL and challenges her sentence in this appeal, arguing that none of her prior convictions qualify as a "controlled substance offense" as defined by U.S.S.G. § 4B1.2(b) and that her sentence should not therefore be enhanced.<sup>1</sup> Bravo argued

---

<sup>1</sup> Bravo also argues that the district court erred in imposing a nighttime curfew and electronic monitoring for six months as special conditions of her supervised release. Because we remand

that while the PSR indicated that she had two previous offenses under Article 401 of the Controlled Substances Act of Puerto Rico, in fact, her previous convictions were under Article 406 of that same Act. In response, probation prepared an amended PSR that indicated that her prior convictions consisted of two Article 406 offenses and one Article 412 offense. P.R. Laws Ann. tit. 24, § 2406; P.R. Laws Ann. tit. 24, § 2412. At the same time, the amended PSR continued to assert that Bravo was subject to U.S.S.G. § 2K2.1(a)(4)(A) because it characterized Bravo's Article 406 convictions as possession of a controlled substance with intent to distribute, without specifying the bases on which it made such a conclusion. Since Article 406 simply criminalizes attempt or conspiracy to commit any offense defined in the Controlled Substances Act of Puerto Rico, the government sought to establish that her underlying conviction was actually an Article 401 offense (which includes possession of a controlled substance with intent to distribute), which arguably qualifies as a "controlled substance offense" under U.S.S.G. § 4B1.2(b). Bravo, however, argued that the government failed to establish the nature of her underlying conviction.<sup>2</sup> United States v. Dávila-Félix, 667 F.3d 47, 55 (1st Cir. 2011) ("The Government bears the burden of establishing that a prior conviction qualifies as a predicate offense for sentencing enhancement purposes.").

The government supported its contention that Bravo was indeed convicted of an Article 401 offense that was later, in its terms, "reclassified" as an Article 406 offense, by providing (1) the charging document and (2) the description of Bravo's criminal history in the PSR. At the sentencing hearing, the district court also had the Spanish-only sentencing order submitted by Bravo herself that allegedly stated that her Article 406 offense was a reclassified<sup>3</sup> Article 401 offense. Although the district court reduced Bravo's BOL by an additional point for timely notifying the government of her intention to enter a plea of guilty pursuant to U.S.S.G. § 3E1.1(b), it ultimately accepted the government's arguments regarding Bravo's convictions under Article 406 and adopted the Guidelines sentencing recommendation calculated in the PSR. The district court judge sentenced Bravo to thirty-seven months of imprisonment and a supervised release term of three years.

We review preserved challenges to procedural reasonableness of a sentence for abuse of discretion. United States v. Cortés-Medina, 819 F.3d 566, 569 (1st Cir. 2016). We have

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for resentencing we do not reach the merits of this argument.

<sup>2</sup> Bravo additionally and alternatively argues that an Article 401 offense also is not a "controlled substance offense." Because we find that the government has failed to provide sufficient evidence to establish that Bravo's convictions were for an Article 401 offense, we do not reach the merits of this argument.

<sup>3</sup> Because this term recurs in this case we point out that the word "reclassify" simply means "to classify anew." Reclassified, Dictionary.com, <http://www.dictionary.com/browse/reclassified> (last visited June 28, 2017). It is frequently the case that the offense of conviction is a lesser offense than that charged (attempted murder may be reclassified as assault, for example). Therefore, even if the government had submitted an English language document stating that Bravo's Article 406 offense was "reclassified" from Article 401, on its own, this fails to justify a finding that Bravo's conviction is actually under Article 401 rather than Article 406.

previously found that Article 406 "encompasses both predicate and non-predicate conduct. It was the Government's burden to establish, through the kinds of documents approved by [*Shepard v. United States*] that [the defendant's] prior conviction was a controlled substance offense." *United States v. Román-Huertas*, 848 F.3d 72, 77 (1st Cir. 2017) (internal quotation marks omitted) (citing *Shepard v. United States*, 544 U.S. 13, 17 (2005)).

Of the three pieces of evidence provided by the government and relied upon by the district court, the conclusory statement in the PSR has no weight in determining Bravo's prior conviction since "a PSR is not 'an approved source for determining whether' a defendant's conviction was based on a controlled substance offense." *Id.* at 77-78 (quoting *United States v. Ramos-González*, 775 F.3d 483, 506 (1st Cir. 2015)). Neither does the charging document provided by the government contribute to the evidence. In a previous judgment, we cited with approval a Sixth Circuit case that stated "a district court may not rely on a charging document without first establishing that the crime charged was the same crime for which the defendant was convicted." *United States v. Rivera*, No. 14-2039, slip op. at 1 (1st Cir. August 17, 2015) (quoting *United States v. Bernal-Aveja*, 414 F.3d 625, 627-28 (6th Cir. 2005)). We further embrace this reasoning here. Defendants are frequently charged for crimes different from those they are ultimately convicted of. The charging document therefore provides little aid in cases such as these when there is no further evidence supporting the argument that the crime charged was the crime of conviction.

The final supporting document -- the Spanish-only sentencing order -- cannot be used as proof because to do so violates the Jones Act, which requires that "[a]ll pleadings and proceedings in the United States District Court of Puerto Rico . . . be conducted in the English language." 48 U.S.C. § 864; *Román-Huertas*, 848 F.3d at 75-76. We have previously found that the use of untranslated documents, though not contemporaneously objected to, "constitute[s] reversible error whenever . . . the untranslated evidence has the potential to affect the disposition of an issue raised on appeal." *Román-Huertas*, 848 F.3d at 76. Since this objection is non-waivable, the fact that Bravo submitted the sentencing order herself or did not object to the use of untranslated document does not prevent us from addressing this error. *Id.* ("[T]he district court had an 'independent duty' to ensure the proceedings were conducted in English, and so 'we relieved the parties of their usual duty to contemporaneously object.'" (quoting *United States v. Rivera-Rosario*, 300 F.3d 1, 6-7 (1st Cir. 2002))). As it is the only piece of evidence that the district court could have possibly relied on to increase Bravo's BOL from fourteen to twenty, it affects the disposition of this appeal and, therefore, it was an error for the district court to rely upon it during sentencing. *Id.* at 78 ("Because the district court relied only on the untranslated document to calculate [the defendant's] total offense level, that document 'affects the disposition' of his appeal." (quoting *United States v. Millán*, 749 F.3d 57, 64 (1st Cir. 2014))).

Therefore, we conclude that the evidence relied upon by the district court failed to sufficiently establish the nature of Bravo's prior "controlled substance offense." Accordingly, we order the sentence be vacated and the case remanded to the district court for resentencing in accordance with this judgment. On remand for resentencing, we caution that the government may not provide any certified translation of the sentencing order for the district court to consider, because we do not typically allow additional factfinding "where the government asked for the enhancement but failed to adduce sufficient proof for its imposition -- a situation in which there

would not likely be reason to permit a second bite at the apple." *Id.* (quoting United States v. Montero-Montero, 370 F.3d 121, 124 (1st Cir. 2004)). On remand, the government may therefore not present new evidence of Bravo's previous convictions.

**Vacated and Remanded.**

By the Court:

/s/ Margaret Carter, Clerk

cc:

Hon. Francisco A. Besosa  
Frances Rios de Moran, Clerk, United States District Court for the District of Puerto Rico  
Vivianne Marie Marrero-Torres  
Eric A. Vos  
John Joseph Connors  
Liza Lorraine Rosado-Rodriguez  
Angelita Bravo-Garcia  
Mariana E. Bauza Almonte  
John Andre Mathews II  
Alexander Louis Alum

\* \* \* \* \*